Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF ILLINOIS,

Petitioner,

vs.

JANE DOE,

Respondent,

and

THE UNITED STATES,

Intervenor-Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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216 pp

QUESTIONS PRESENTED

1. Can a cause of action for monetary damages be maintained under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), against educational institutions receiving federal funds for failing to take prompt, appropriate and/or effective action to remedy student peer sex harassment without pleading and proving that the institution's ineffective response was motivated by an intent to discriminate on the basis of sex contrary to the decisions of the Fifth and Eleventh Circuits in *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S.Ct. 165 (1996) and *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.) (*en banc*), *petition for cert. filed*, 66 USLW 3387 (Nov. 19, 1997)?

2. If a cause of action for monetary damages can be maintained under Title IX against educational institutions receiving federal funds for failing to take prompt, appropriate and/or effective action to remedy student peer sex harassment without pleading and proving that the institution's ineffective response was motivated by an intent to discriminate on the basis of sex, is the applicable standard of liability deliberate indifference pursuant to *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (1998)?

3. Did Congress abrogate the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid (*albeit* unstated) exercise of power under Section 5 of the Fourteenth Amendment as required by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)?

4. Does the Seventh Circuit's recognition of a cause of action herein which does not require proof of sexually

QUESTIONS PRESENTED – Continued

discriminatory intent conflict with the Seventh Circuit's conclusion herein that Congress abrogated the Eleventh Amendment sovereign immunity of the States pursuant to a valid exercise of power under § 5 of the Fourteenth Amendment because such a cause of action exceeds the substantive guarantees of the Fourteenth Amendment pursuant to *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997)?

LIST OF PARTIES

This action was initially filed by Respondent Jane Doe, then a minor, and by her parents John and Janet Doe. John and Janet Doe where subsequently dismissed from this action as party plaintiffs.

This action was initially filed against Petitioner The Board of Trustees of the University of Illinois, and against individual administrators Alice Dean Davis-Smith, Joel Crames, Henry Meares, Barbara L. Wysocki, William R. Sutton, Theodore L. Brown, Susan T. Gonzo and Larry R. Faulkner. The individual administrators were subsequently dismissed from this action as party defendants.

The Board of Trustees of the University of Illinois is a body politic and corporate (110 ILCS § 305/1, et seq.), and an arm of the State of Illinois (*Cannon v. Univ. of Health Sciences/Chicago Med. Sch.*, 710 F.2d 351, 356-57 (7th Cir. 1993)).

The United States, Department of Justice, intervened as a matter of right to defend the constitutionality of Congress' abrogation of the States' Eleventh Amendment immunity from suit under Title IX, and as amicus curiae on the student peer sex harassment issue.

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PETITION FOR WRIT OF CERTIORARI

Petitioner The Board of Trustees of the University of Illinois (the "University") respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") which: (1) reversed the district court's dismissal of Respondent Jane Doe's ("Doe") monetary damage claim under Title IX against the University for failing to take prompt, appropriate and/or effective action to remedy student peer sex harassment; and (2) affirmed the district court's denial of the University's Eleventh Amendment sovereign immunity defense.

OPINIONS BELOW

The Seventh Circuit's opinion and denial of the University's motion for rehearing, with suggestion for rehearing *en banc*, are published at 138 F.3d 653 (7th Cir. 1998), and are reprinted in the Appendix ("A") at pages 1 and 134. The unpublished opinions of the district court and the magistrate are reprinted in the Appendix at 69, 80, and 86, respectively.

JURISDICTION

On March 3, 1998, the Seventh Circuit issued its opinion herein. (A. at 1). The Seventh Circuit denied the University's petition for rehearing, with suggestion for

rehearing *en banc*, on April 14, 1998. (A. at 134). The University invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the U.S. Const. art. I, § 8, cl. 1, the U.S. Const. amend. XI, the U.S. Const. amend. XIV and Title IX, which are reprinted in the Appendix at 136-42. 28 U.S.C. § 2403(a) may also apply because this petition questions the constitutionality of an Act of Congress. The Seventh Circuit did not certify to the Attorney General that the constitutionality of an Act of Congress was drawn into question; however, the Attorney General had intervened as a matter of right.

STATEMENT OF THE CASE

A. Factual Background[1]

Doe is a former student at University High ("Uni High") which the University oversees. (Compl. at ¶¶ 17, 18; A. at 152). Doe alleges that commencing in November 1992, a male student ("M.") engaged in inappropriate

[1] The University accepted as true the factual allegations of Doe's complaint ("Compl.", a copy of which is reprinted in the Appendix at 148) solely for purposes of its motion to dismiss which challenges the sufficiency of the allegations even if true, to state a cause of action for monetary damages under Title IX. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

sexual advances toward her on and off school premises. On January 2, 1993, M. allegedly sexually assaulted Doe in his bedroom. On January 21, 1993, Doe told her parents. Doe's parents confronted M.'s parents. M.'s parents denied the incident. M. allegedly told his friends that Doe "ratted" on him. Doe alleges these events precipitated a campaign of sexual harassment of her by a group of boys which lasted for the duration of her schooling at Uni High through May 1994. (*Id.* at ¶¶ 20-24; A. at 152-53). M. did not return to Uni High for the 1993-94 school year, but Doe alleges M.'s friends, especially B. and T., continued to harass her. (*Id.* at ¶¶ 49-50). Doe withdrew from Uni High after the 1993-94 school year and began to attend a private school. (*Id.* at ¶ 91).

No Uni High or University administrator or employee is alleged to have participated in any sexual harassment of Doe. Nor is the University alleged to be responsible for the alleged sexual misconduct of student M. in late 1992 and early 1993 which led to the alleged harassment of Doe by her student peers, as Doe first complained about the harassment to University officials commencing in late February 1993.

Doe acknowledges a variety of efforts by the University responsive to her complaints. For example, when Doe first informed the principal about the harassment in late February 1993, he offered her words of encouragement which led her to believe he would protect her. When Doe's father met with him about the extent of the harassment in March of 1993, the principal acknowledged the problem and promised to remedy the situation. The principal's solution was to detain Doe's class after an all-

school assembly and threaten to expel them if their misbehavior continued. (*Id.* at ¶¶ 32-33; A. at 155).

Doe acknowledged other responsive efforts as well. For example, the assistant director outlined prohibited harassing behaviors to an all-school assembly during the first week of the 1993-94 school year. (*Id.* at ¶ 47; A. at 158). Uni High appointed a teacher as the "intake person" for sex harassment complaints in January 1994. (*Id.* at ¶ 61; A. at 161). Additional allegations Doe made in January of 1994 were promptly investigated, and two students were suspended for ten days. (*Id.* at ¶ 63, 68; A. at 161-62). The interim principal spoke to students about the unfortunate incidents of sex harassment in February 1994. (*Id.* at ¶ 70; A. at 163). An alleged harasser was transferred out of Doe's biology class at the request of Doe's parents in February of 1994. (*Id.* at ¶ 73; A. at 163). A variety of University and Uni High officials are alleged to have engaged in numerous conversations with Doe, her parents, the alleged harassers, their parents and other students on numerous occasions regarding Doe's complaints and ways to deal with the alleged situation. (Compl., *passim*; A. at 148). The crux of Doe's claim, however, faults the promptness, appropriateness and/or effectiveness of the University's responsive actions. (*Id.*). Doe also faults the University's alleged failure to apprise students of their rights under Title IX. (*Id.*).

B. Procedural Background

On May 23, 1995, Doe filed suit, in pertinent part, for monetary damages against the University under Title IX. (A. at 148). On August 4, 1995, the University moved to

dismiss Doe's Title IX claims against the University for failure to state a claim because the University's alleged failure to take prompt, appropriate and/or effective action to remedy alleged student peer sex harassment or to apprise students of their Title IX rights did not constitute intentional gender based discrimination by a federally funded educational provider in violation of Title IX. On January 22, 1996, the magistrate judge recommended in pertinent part that Doe's Title IX claim against the University be dismissed, without prejudice and with leave for Doe to replead that the University's alleged ineffectiveness was motivated by an intent to discriminate on the basis of sex. (A. at 127-28). On February 14, 1996, Doe and the University filed objections to various aspects of the magistrate's recommendations. On March 29, 1996, the district court denied the parties' objections and adopted the magistrate's decision. (A. at 80).

On April 12, 1996, Doe and the University moved the district court to reconsider and/or certify various issues presented. Doe requested the district court to reconsider, in pertinent part, the dismissal of her Title IX claim against the University for failure to allege intentional discrimination on the basis of sex by the University or, alternatively, to certify the issue for interlocutory appeal. The University requested the district court to reconsider its dismissal of Doe's Title IX claims against the University without prejudice and with leave to replead in light of the Supreme Court's intervening decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The University asserted that Doe's Title IX claim against the University was barred by the Eleventh Amendment of the United States Constitution because Title IX was enacted

and extended to the States pursuant to Congress' powers under the Spending Clause, Article 1, Section 8, cl. 1, of the United States Constitution. Therefore, Congress' extension of Title IX to the States was not a valid abrogation of the Eleventh Amendment sovereign immunity of the States from suit pursuant to Congress' powers under Section 5 of the Fourteenth Amendment as required by *Seminole Tribe*. On September 25, 1996, the district court denied both parties' motions for reconsideration; however, the district court granted Doe's motion to certify the dismissal of her Title IX claim against the University for failure to allege intentional discrimination by the University against her on the basis of her sex. (A. at 70). Specifically, the district court certified for interlocutory appeal "the issue of whether a cause of action lies under Title IX for failure to inform a student [of] his or her rights under Title IX and failure to implement prompt and appropriate remedial action to stop peer-to-peer sexual harassment despite knowledge of the same." (A. at 79).

On October 3, 1996, Jane Doe petitioned the Seventh Circuit for permission to appeal the district court's dismissal of her Title IX claims pursuant to 28 U.S.C. § 1292(b). On October 4, 1996, the University filed a timely notice of appeal of the district court's rejection of the University's sovereign immunity defense pursuant to 28 U.S.C. § 1291 as a matter of right under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). On December 5, 1996, the Seventh Circuit granted Doe's petition to appeal the issue certified by the district court and consolidated the appeals herein.

On March 3, 1998, the Seventh Circuit reversed the district court's dismissal of Doe's Title IX claim for monetary damages against the University, without prejudice and with leave to replead intentional discrimination. *Doe*, 138 F.3d at 668 (A. at 37). The Seventh Circuit held that a cause of action for monetary damages can be maintained under Title IX against educational institutions accepting federal funds for failing to take prompt and appropriate action to remedy student peer sex harassment *without requiring any proof of intent by the institution to discriminate on the basis of sex*. The majority opinion concludes that the *failure* to take appropriate steps in response to known student peer sex harassment *is itself* intentional discrimination by the institution on the basis of sex. *Id.* at 661 (A. at 18).

Five opinions were issued in *Doe*, with conflicting standards and definitions of the contours of the cause of action recognized. Justice Cummings, writing for the majority, conditioned the imposition of liability on Title IX fund recipients on actual knowledge by responsible officials that the harassment was taking place, and the failure to take prompt and appropriate remedial action. *Id.* at 661 (A. at 18). Noting that recipients need not be successful in completely eradicating sexual harassment, the majority concluded that recipients can avoid Title IX liability if school officials "investigate aggressively" and respond "consistently and meaningfully" when complaints are found to have merit. *Id.* at 667-68 (A. at 35). Justice Evans concurred with the majority, but stressed that he would give "considerable deference" to schools and permit a "wide range" of responses. *Id.* at 678 (A. at 61). Justice Coffey, concurring in part and dissenting in

part, disagreed that Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), hostile environment sex harassment law defined Title IX law or that negligence by school officials could form a sufficient basis for liability. *Id.* at 675-76 (A. at 55-6). Justice Coffey would limit liability to harassment which takes place while students are engaged in school sponsored activities. *Id.* at 674 (A. at 49). And Justice Coffey would underscore the "considerable deference" to be accorded school's responsive actions. *Id.* at 671 (A. at 45).

The panel opinion was circulated to all of the judges of the Seventh Circuit Court of Appeals pursuant to Seventh Circuit Rule 40(e) to consider whether a majority of the justices wished to *sua sponte* reconsider the opinion *en banc* because it created a conflict among the circuits. Chief Justice Posner, joined by Justices Flaum and Manion, dissenting from the denial of *sua sponte* rehearing *en banc*, favored the adoption of a standard of liability of "deliberate indifference." *Id.* at 679 (A. at 65). Justice Easterbrook, noting the uncertainty of the Title IX standard of liability, opined that deliberate indifference made a great deal of sense, but concluded it was not necessary to reach this issue at this stage of the proceedings. *Id.*

With respect to the Eleventh Amendment issue, the Seventh Circuit affirmed the district court's denial of the University's Eleventh Amendment sovereign immunity defense. *Id.* at 668 (A. at 37). The court concluded that Title IX was passed pursuant to Congress' Fourteenth Amendment powers, as well as its Spending Clause powers. The Seventh Circuit reasoned that Congress need not articulate that it was exercising its powers under the Fourteenth Amendment to validly abrogate the States'

Eleventh Amendment immunity from suit; rather, the appropriate question was whether the objectives of Title IX were within Congress' powers under the Fourteenth Amendment. The Seventh Circuit answered that question in the affirmative. *Id.* at 659-60 (A. at 13-14).

On April 14, 1998, the Seventh Circuit denied the University's motion for rehearing, with suggestion for rehearing *en banc*. (A. at 135).

REASONS THE COURT SHOULD GRANT A WRIT OF CERTIORARI

A. *Doe's* Recognition of a Cause of Action For Monetary Damages Under Title IX for Failing to Promptly and Appropriately Respond to Student Peer Sex Harassment Complaints *Without* Proof of an Intent to Discriminate on the Basis of Sex by The Institution Directly Conflicts With Decisions of The Fifth And Eleventh Circuits.

Doe recognized a cause of action for monetary damages under Title IX against educational institutions accepting federal funds for failing to take prompt and appropriate action to remedy student peer sex harassment *without* requiring any proof of *intent by the institution to discriminate on the basis of sex*. *Doe* acknowledged that Title IX requires a showing of intentional discrimination by the institution. However, *Doe* concluded that: "[t]he failure promptly to take appropriate steps in response to known [student peer] sexual harassment *is itself* intentional discrimination *on the basis of sex*." *Doe*, 138 F.3d at 661 (A. at 18) (emphasis added). *Doe* rejected "the district court's further requirement that plaintiffs in

such cases plead or prove that the recipient, or any of its officials, failed to respond *as a result of sexually discriminatory intent." Id.* (emphasis added).

Doe is contrary to Title IX principles established by this Court, directly conflicts with the opinions of the Fifth and Eleventh Circuits in *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S.Ct. 165 (1996), and *Davis v. Monroe Bd. of Educ.*, 91 F.3d 1418 (11th Cir. 1996) (*en banc*), *petition for cert. filed*, 66 USLW 3387 (Nov. 19, 1997) and also mistakenly relies on a vacated panel opinion of the Fourth Circuit in *Brzonkala v. Virginia Polytechnical Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997), *reh'g en banc granted, opinion vacated* (4th Cir. Feb. 5, 1998) (copy of order vacating opinion attached at A. 175).

This Court has held that Spending Clause statutes such as Title IX support a claim for monetary damages only for *intentional* discrimination. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65 (1992). "The point of not permitting monetary damages for an *unintentional* violation is that the receiving entity of federal funds *lacks notice* that it will be liable for a monetary award." *Id.* at 65 (emphasis added). In *Franklin*, the Supreme Court concluded that sexual harassment of a student *by a teacher* constituted *intentional* discrimination *by the school. Id.* at 74. And in *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (1998), this Court concluded that schools could be held liable for such teacher student sex harassment only if school officials had actual notice of the harassment and their failure to adequately respond amounted to deliberate indifference to discrimination. *Id.* at 1999.

This Court has never addressed whether an institution's failure to properly and appropriately respond to student peer sex harassment is actionable under Title IX and, if so, under what cirumstances.

The express language of Title IX does not create such a cause of action, nor are such claims contemplated in Title IX's legislative history.[2] The only other circuit courts of appeal to definitively address the availability of monetary damages under Title IX for a recipient's alleged ineffective response to claims of student peer sex harassment are the Fifth and Eleventh Circuits in *Rowinsky* and *Davis*.[3] Both courts of appeal held that *no* such cause of action exists, *absent* allegations that the educational institution responded differently to sex harassment claims *based on gender*. *Rowinsky*, 80 F.3d at 1016; *Davis*, 120 F.3d at 1395.

Unlike the Seventh Circuit, neither the Fifth Circuit nor the Eleventh Circuit viewed allegations of failure to adequately respond to allegations of student peer sex harassment as intentional discrimination by the educational institution itself.[4] The Fifth Circuit concluded:

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[2] Title IX provides, in pertinent part, that "[n]o person . . . shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added).

[3] *Doe* mistakenly relied on the panel opinion in *Brzonkala* (*Doe*, 138 F.3d at 660-61; A. at 17), which has been reheard *en banc* and awaits decision by the full Fourth Circuit Court of Appeals, thereby vacating the panel opinion pursuant to Fourth Circuit Rule 35(c). (A. at 175).

[4] *Doe* asks why else would an institution fail to take prompt and appropriate action to remedy peer sex harassment. *Doe*, 138 F.3d at 663 (A. at 23). However, there could be a myriad of

> In the case of peer sexual harassment, a plaintiff must demonstrate that *the school district responded to sexual harassment claims differently based on sex*. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye towards sexual harassment of girls while addressing assaults that harmed boys.

Rowinsky, 80 F.2d at 1016 (emphasis added). Similarly, the Eleventh Circuit in *Davis* observed:

> The terms of Title IX gave educational institutions notice that they must *prevent their employees from themselves engaging in intentional gender discrimination. See Franklin*, 503 U.S. at 75, 112 S. Ct. at 1037. Thus, school administrators cannot deny admission to female applicants *because of their gender. See Cannon* [*v. Univ. of Chicago*, 441 U.S. 677, 709 (1979)]. School administrators cannot discriminate against teachers *on account of sex. See North Haven Bd. of Educ.*, 456 U.S. at 530, 102 S. Ct. at 1922-23. *Teachers* cannot *sexually harass* their students. *See Franklin*, 503 U.S. at 74-75, 112 S. Ct. at 1037.
>
> The present complaint, however, does *not allege* that a school employee *discriminated* against

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reasons, such as inadequate funding, competing obligations to the alleged harassing student such as due process rights and the right to a public education, differing judgments regarding the seriousness or immediacy of the situation or dangers presented or the likely effectiveness of the chosen response or miscommunication, not to mention the difficulties faced by school officials seeking to reign in " . . . kids with raging hormones who may be crude and insensitive when dealing with students of the opposite sex." *Doe*, 138 F.3d at 678 (Evans) (A. at 61).

> LaShonda in any of the foregoing ways. The complaint does not allege, for example, that [any of the school administrators] sexually harassed LaShonda. Rather, the complaint alleges that these individuals *failed to take measures sufficient* to prevent a non-employee from discriminating against LaShonda.

Davis, 120 F.3d at 1401 (emphasis added).[5]

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[5] Even in the employment setting under Title VII (which the University acknowledges does *not* control, as this Court held in *Gebser*, 118 S.Ct. at 1995-96), the Supreme Court held: "Title VII does not award damages against employers who cannot prove a *nondiscriminatory* reason for adverse employment action, but only against employers who are proven to have taken adverse employment action *by reason of* (in the context of the present case) race. That the employer's proffered reason is *unpersuasive*, or even obviously *contrived*, does *not* necessarily *establish* that the plaintiff's *proffered reason of race* is correct." *St. Mary Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993) (emphasis added).

Similarly, as the Supreme Court observed in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1002 (1998) (internal citations and quotations omitted): "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination because of sex. We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

By analogy, an educational institution's failure to act promptly and appropriately to remedy student peer sex harassment without adequate excuse does not establish that the failure was *by reason of sex*, and intentional *sex* discrimination is what Title IX prohibits.

The fact that Title IX was enacted pursuant to Congress' Spending Clause powers was key to the Fifth and Eleventh Circuit Courts' conclusions in *Rowinsky* and *Davis* that the recipients' alleged failures to take prompt and appropriate action to remedy student peer sex harassment simply were not actionable as intentional sex discrimination by the recipients under Title IX. As the Fifth Circuit in *Rowinsky* noted:

> The fact that [T]itle IX was enacted pursuant to Congress' spending power is evidence that it prohibits *discriminatory acts* only *by grant recipients*. . . . Imposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have *little control* over the multitude of third parties who could conceivably violate the prohibitions of [T]itle IX.

Rowinsky, 80 F.3d at 1012-13 (emphasis added). The Eleventh Circuit in *Davis* as well concluded that: "Congress must be unambiguous in expressing to school districts the conditions it has attached to the receipt of federal funds." *Davis*, 120 F.3d at 1399 (citing *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2434 (1997)). This is because recipients of federal funds are free to decline prospectively or to terminate retrospectively a grant of federal funding if the recipient wishes not to accept the conditions Congress has attached to its offer. *Davis*, 120 F.3d at 1399.[6] As nothing in the language or history of Title IX suggests that Title IX imposes liability on institutions for student peer sexual

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[6] As this Court noted in *Gebser*, damage awards for sex harassment could potentially exceed a recipient's federal funding level. *Gebser*, 118 S.Ct. at 1997.

harassment, educational institutions simply were not on notice when they accepted federal funding that they could be held liable for failing to take measures sufficient to prevent third party students from sexually harassing other students. *Id.* at 1401.

Doe ignored the contractual nature of Title IX as Spending Clause legislation. *Doe* criticized *Davis* for focusing too narrowly on the statute and legislative history of Title IX, thereby ignoring the Supreme Court's instruction that Title IX be given "a sweep as broad as its language." *Doe*, 138 F.3d at 665 (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)) (A. at 28). Instead, *Doe* held that the courts can and should look to cases decided under Title VII to make an informed analysis under Title IX. (*Id.*)

But *Rowinsky* and *Davis* properly focused on the contractual nature of Title IX and refused to apply Title VII principles to Title IX. As this Court concluded in *Gebser*:

> This contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. . . . Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on protecting individuals from discriminatory practices *carried out by recipients of federal funds.*
>
> * * *
>
> Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, U.S. Const., Art. I, § 8, cl.1, as it has in Title IX and Title VI [42 U.S.C. § 2000d, *et seq.*], we examine closely the propriety of private

> actions holding the recipient liable in monetary damages for non-compliance with the condition . . . Our central concern in that regard is with ensuring that the receiving entity of federal funds has notice that it will be liable for a monetary award.

Gebser, 118 S.Ct. at 1998 (emphasis added) (internal citations and quotations omitted).

The Seventh Circuit in *Doe* also asserts institutions were put on notice by the Department of Education, Office of Civil Rights' (OCR) final guidelines (issued long after the events at issue here) (A. at 143) and OCR's earlier letters of finding that Title VII principles of hostile environment sex harassment applied to Title IX. *Doe*, 138 F.3d at 667 (A. at 33). But this Court rejected a similar argument, paying no deference to OCR's guidelines or letters of finding in the teacher student sex harassment context. *Gebser*, 118 S.Ct. at 1995.[7]

This Court should grant the University's petition for a writ of certiorari to resolve the direct conflict between the opinions of the Seventh Circuit and the Fifth and Eleventh Circuits, as well as *Doe's* conflict with the opinions of this Court addressing claims of teacher student sexual harassment under Title IX.

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[7] *See also Rowinsky*, 80 F.3d at 1015 (agency's interpretation given "very little deference" because "the OCR has only recently treated complaints of peer harassment within its jurisdiction" and OCR letters of finding "do not reflect the deliberate consideration of a rule making proceeding"); *Davis*, 120 F.3d at 1404 n. 23 (refusing to defer to OCR's current interpretation of Title IX as expressed in its final policy guidelines).

B. *Doe*'s Hybrid Standard of Liability Applied to Institutional Responses to Complaints of Student Peer Sex Harassment Conflicts With The Deliberate Indifference Standard This Court Applied to Complaints of Teacher Student Sex Harassment.

The Seventh Circuit in *Doe* held that schools have a duty under Title IX to take prompt and appropriate action to remedy student peer sexual harassment. *Doe*, 138 F.3d at 667 (A. at 34). The Seventh Circuit conditioned liability on actual knowledge by responsible officials of the recipient and failure to take prompt and appropriate responsive actions. Noting that schools are not required to be successful in completely eradicating sexual harassment, the Seventh Circuit concluded that an institution can "avoid Title IX liability if school officials *investigate aggressively* all complaints of sexual harassment and *respond consistently* and *meaningfully* when those complaints are found to have merit." *Id.* at 667-68 (A. at 35) (emphasis added). Applying this standard, the Seventh Circuit concluded that "Doe has alleged facts that would allow a jury to find that the University failed to respond promptly and appropriately to her complaints." *Id.* at 668 (A. at 37).

This standard of liability conflicts with the deliberate indifference standard of liability this Court has now held is applicable to an institution's failure to sufficiently respond to complaints of teacher student sex harassment under Title IX. In *Gebser*, this Court concluded that an educational institution receiving federal funds could be held liable for monetary damages for teacher student sex harassment only if an official with authority to institute corrective measures on the recipient's behalf had actual

knowledge of the harassment and failed adequately to respond. *Gebser*, 118 S.Ct. at 1999. The Supreme Court held that the response must amount to "deliberate indifference to discrimination," explaining:

> We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an *official decision* by the recipient not to remedy the violation. That framework finds a rough parallel in a standard of deliberate indifference. Under a lower standard, there would be risk that the recipient would be liable in damages *not* for its own official decision but instead for its employees' independent actions.

Id. at 1999 (emphasis added). The Supreme Court in *Gebser* also concluded that a recipient's alleged failure to comply with federal regulations requiring it to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims does not itself constitute discrimination in violation of Title IX or establish the requisite actual notice or deliberate indifference. *Id.* at 2000.

Certainly, this Court would not apply an easier standard of Title IX liability to institutional responses to student peer sex harassment than applied to teacher student sex harassment. A recipient's power to control or remedy the sexually harassing behavior of its adult employees is clearly greater than its ability to control the sexually harassing behavior of adolescent students. As

concurring Justice Evans observed in *Doe*: " . . . [s]chools are full of all sorts of kids . . . And unlike harassers in the work place, students can't be fired." *Doe*, 138 F.3d at 678 (A. at 61).[8] In addition, the First Amendment and due process rights of students at public institutions must be considered in disputed instances of alleged student peer sex harassment.[9] So the deliberate indifference standard this Court held applies to institutional liability for teacher student harassment must also be the standard applicable to institutional liability for student peer sex harassment.

Doe's allegations, which in effect challenge the adequacy of the acknowledged responsive efforts by the University, do not meet the deliberate indifference standard. The University's ineffective responses as alleged by

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[8] And as dissenting Chief Justice Posner, joined by Justices Flaum and Manion, suggested, a standard of liability of "deliberate indifference" may be the most appropriate to give the schools sufficient protection against "staggering [liabilities], since insults, teasing, petty persecutions, grabbing, poking, sexual experimentation, and other forms of what might actually or arguably constitute sexual harassment are an omnipresent feature of school life." *Doe*, 138 F.3d at 679 (A. at 65).

[9] *See, e.g., UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.*, 774 F. Supp. 1163, 1176-81 (E.D. Wis. 1991), where the court struck down a rule prohibiting discriminatory student speech which created a sexually hostile environment and discipline imposed for student misconduct thereunder as violative of the student's First Amendment and due process rights, and rejected as inapposite the public university's argument that the rule was supported by Title VII law requiring employers to take appropriate corrective action to remedy a sexually hostile environment.

Doe do not reflect a deliberate or conscious choice by the University amounting to a policy or practice sufficient to hold the University liable. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989) ("Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by our prior cases – can a city be liable for such a failure under Section 1983.")[10]

This Court should grant the University's petition for a writ of certiorari to correct the conflict between the deliberate indifference standard of liability this Court has held is applicable to teacher student sex harassment claims under Title IX and the hybrid standard of liability the Seventh Circuit in *Doe* applied to student peer sex harassment. This Court should then either hold that Doe has not alleged facts constituting deliberate indifference as a matter of law, or remand the case to the Seventh Circuit to deal with this issue.[11]

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[10] Dissenting Chief Justice Posner defined "deliberate indifference" in the context of an institution's response to claims of student peer sex harassment to mean that the "school (1) actually knew of (2) hostile or offensive conduct likely to interfere with the victim's education (3) deliberately did nothing or took steps that it knew would be ineffectual to protect the victim (4) without excuse (for it might be difficult or even impossible to take effective measures)." *Doe*, 138 F.3d at 680 (A. at 68). Judge Posner opined that "elements (1) and (4) will both be more difficult for the plaintiff to satisfy when the harassment occurs off the school premises; and that is how it should be because it is much more difficult for the school to discover and remedy off premises harassment." *Id.*

[11] *See, e.g., City of Canton, Ohio*, 489 U.S. at 392 ("Whether respondent should have an opportunity to prove her case under

C. *Doe's* Conclusion That Congress Abrogated The States' Eleventh Amendment Immunity From Suit Under Title IX Pursuant to a Valid (*Albeit* Unstated) Exercise of Power Under § 5 of The Fourteenth Amendment Contradicts *Seminole Tribe*.

The Seventh Circuit in *Doe* held that Congress abrogated the Eleventh Amendment sovereign immunity of the States from suit under Title IX pursuant to a valid (*albeit* unstated) exercise of power under Section 5 of the Fourteenth Amendment because the objectives of Title IX were within Congress' powers thereunder. *Doe*, 138 F.3d at 660 (A. at 15). In so holding, the Seventh Circuit concluded that the constitutionality of legislation does not turn on Congress' recitation of the powers under which it enacted the legislation at issue. *Id.* at 658-59 (A. at 14).

The University submits that these conclusions misapprehend the second prong of the test articulated by this Court in *Seminole Tribe* to determine whether Congress has abrogated the Eleventh Amendment sovereign immunity of the States from suit pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment. The plain language of *Seminole Tribe* asks whether Congress *acted* (not whether Congress *could have* acted) pursuant to the Fourteenth Amendment:

> [O]ur inquiry into whether Congress has the power to abrogate unilaterally the States' immunity from suit is narrowly focused on one question: *Was* the Act in question *passed* pursuant to

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the 'deliberate indifference' rule we have adopted is a matter for the Court of Appeals to deal with on remand.").

> a constitutional provision granting Congress the power to abrogate?

Seminole Tribe, 517 U.S. at 59 (emphasis added). Moreover, this Court has long held that the courts "should not quickly attribute to Congress an *unstated* intent to act under its authority to enforce the Fourteenth Amendment." *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (emphasis added)). As the dissent in *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 845 (6th Cir. 1997) (Boggs, J. concurring/dissenting), aptly pointed out:

> In *Seminole Tribe v. Florida*, the Supreme Court clearly held that states could not be called into federal court against their will under legislation passed pursuant to the Commerce Clause. While the Court noted that the question of the power of Congress to pass similar legislation under § 5 of the Fourteenth Amendment was not raised before it, *it certainly did not endorse this court's view today that it was free to scour the Constitution looking for sources of power that Congress never invoked*. Indeed, it seems to me that our examination of the sources of power for the statute directly contradicts the holding of *Pennhurst State Sch. and Hosp. v. Halderman*. That case held that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Our previous cases are wholly consistent with that view, since *Congress in those cases expressly articulated its intent to legislate pursuant to § 5. . . .* Our court today holds directly to the contrary: not only can it be lightly assumed, it can always be

> assumed, that Congress acted under its Fourteenth Amendment power, if such action would be constitutional.
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> * * *
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> Moreover, I cannot agree that the rules set forth in *Pennhurst*, that a clear statement is required for Congress to use its Fourteenth Amendment power, was superseded by *EEOC [v. Wyoming*, 460 U.S. 226 (1983)]. First, as the Court itself admits, *EEOC*'s footnote 18 was mere dicta. Second, *EEOC* does not state that *Pennhurst*'s clear statement rule was entirely invalid, only that it applied to statutory construction, not to the issue of the limits of Congress' powers. But that is exactly my point here. I do *not* propose holding that the Equal Pay Act's grant of authority to federal courts to entertain suits against the States under its provisions was *unconstitutional* under the Eleventh Amendment. I only propose holding that because Congress did not say, or even imply, that it was acting pursuant to the Fourteenth Amendment, and in fact noted that it was acting pursuant to the Commerce Clause in the original FLSA, *Seminole Tribe*'s holding that only § 5 of the Fourteenth Amendment can abrogate Eleventh Amendment immunity means that Congress *did not* (*not 'could not'*) grant the federal courts jurisdiction over Equal Pay Act claims against a state.

Id. at 846 (emphasis added).

The Court need not hold that an extension of Title IX to the States is unconstitutional under the second prong of *Seminole Tribe*. (*But see*, discussion, *infra*, at pp. 24-28). However, the University submits that because Congress

did not say, or even imply, that it was acting pursuant to the Fourteenth Amendment, *Seminole Tribe's* holding that only an exercise of powers under Section 5 of the Fourteenth Amendment can abrogate the Eleventh Amendment sovereign immunity of the States means that Congress *did not* (*not could not*) grant the federal courts jurisdiction over Title IX claims against a State. This Court should grant the University's petition for a writ of certiorari to address this fundamental issue of the sovereign immunity of the States.

D. *Doe's* Recognition of a Title IX Cause of Action Which Does Not Require Proof of Sexually Discriminatory Intent Cannot Be Reconciled With *Doe's* Conclusion That Congress Abrogated The States' Eleventh Amendment Sovereign Immunity From Suit Under Title IX Pursuant To A Valid Exercise of Power Under § 5 of the Fourteenth Amendment Because Such A Cause of Action Exceeds The Substantive Guarantees of The Fourteenth Amendment.

The Seventh Circuit in *Doe* concluded that Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment because Title IX's objectives were within Congress' powers under Section 5 of the Fourteenth Amendment. *Doe*, 138 F.3d at 659-660 (A. at 13). This holding cannot be reconciled with the Seventh Circuit's conclusion in *Doe* that Title IX imposes liability on institutions for failing to take prompt and appropriate action to remedy student peer sex harassment *without* proof of sexually discriminatory intent by the institution. *Id.* at 667 (A. at 34). Such a

cause of action exceeds the substantive guarantees of the Fourteenth Amendment as defined by the Supreme Court in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). The University submits that the Seventh Circuit erred when it implied a cause of action against the States under Title IX which would have exceeded Congress' power to legislate under Section 5 of the Fourteenth Amendment.[12]

In *City of Boerne*, this Court concluded that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), was beyond Congress' remedial power under Section 5 of the Fourteenth Amendment. This Court explained that Congress' power under Section 5 "extends to enforcing the provisions of the Fourteenth Amendment." *City of Boerne*, 117 S.Ct. at 2164 (internal quotation omitted). "The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* (emphasis added). This Court held that "remedial legislation under Section 5 should be adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against." *Id.* at 2170 (internal citations and quotations omitted).

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[12] The law is established that Acts of Congress should be construed, where possible, in a manner consistent with constitutionality. *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citations omitted)).

Claims asserting a denial of equal protection under the Fourteenth Amendment require proof of *intent* to *discriminate* based on the protected classification – here, gender.[13] For example, in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), in concluding that a student could maintain an equal protection claim, the court defined the question as "whether Nabozny can show that he received different treatment *because of his gender.*" *Id.* at 454 (emphasis added). The court reasoned:

> In order to establish liability under § 1983, Nabozny must show that the defendants acted with *a nefarious discriminatory purpose*, . . . and discriminated against him *based on* his membership in a definable class. . . . The gravamen of equal protection lies not in the fact of deprivation of a right but in the *invidious classification* of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation. Discriminatory purpose, however, implies more than intent as volition or intent as awareness of consequences. It implies that a decision maker *singled out a particular group for disparate treatment* and selected his course of action at least in part for the purpose of causing its adverse effects on the *identifiable group*.

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[13] The law is established that the due process clause of the Fourteenth Amendment does not impose on school officials the affirmative duty to protect school children from the actions of private actors, including other students. *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990).

Id. at 453 (emphasis added) (internal citations and quotations omitted). Nabozny stated an equal protection claim because "if Nabozny's evidence is considered credible, the records taken in conjunction with the defendants' admissions demonstrate that the defendants *treated male and female victims differently.*" *Id.* at 445 (emphasis added).[14]

The cause of action recognized by the Seventh Circuit in *Doe* does not require any showing that the institution treated male and female students differently or otherwise acted with an intent to discriminate due to gender, so the cause of action the Seventh Circuit held was actionable under Title IX would not be actionable under the Equal Protection Clause of the Fourteenth Amendment. Under *City of Boerne*, legislation which created rights more extensive than the substantive guarantees of the Fourteenth Amendment would exceed Congress' powers under Section 5 of the Fourteenth Amendment. Congress

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[14] *See also Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1186-87 (7th Cir. 1986) (emphasis added) ("The core of any equal protection case is, of course, in showing intentional discrimination . . . against the plaintiff *because of her membership in the class. . . .* "); *Rue v. Sammerjan*, 816 F. Supp. 1326, 1331 (E.D. Wisc. 1993) (emphasis added) (internal citations omitted) ("The gravamen of the plaintiff's allegations . . . rests in her suggestion that her complaints . . . were mishandled by the university defendants. However, Ms. Rue has not set forth any facts to suggest that the university defendants intentionally discriminated against her *because of her membership in a protected class. . . .* While she did not get the response she desired, and in some cases the responses were delayed, there is nothing to support a claim of intentional sexual discrimination by the university defendants in violation of the equal protection clause."), *aff'd*, 32 F.3d 570 (7th Cir. 1994).

would not have had the authority to abrogate the States' Eleventh Amendment sovereign immunity from suit under such legislation. Nor can the court abrogate the States' Eleventh Amendment immunity from such a cause of action.[15]

The Supreme Court should grant the University's petition for a writ of certiorari to resolve the conflict between the Seventh Circuit's recognition of a cause of action that does *not* require proof of *discriminatory intent* by the institution *on the basis of sex* and, thereby exceeds the substantive guarantees of the Fourteenth Amendment, and the Seventh Circuit's conclusion that Congress abrogated the States' Eleventh Amendment immunity from such a suit under Title IX pursuant to a valid exercise of Congress' powers under § 5 of the Fourteenth Amendment.

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[15] *See also Kimel v. State Bd. of Florida Regents*, 139 F.3d 1426, 1446-48 (11th Cir. 1998) (Cox, J., concurring in part and dissenting in part) (As the ADEA creates rights which exceed the substantive guarantees of the Fourteenth Amendment, it is not a valid exercise of Congress' Fourteenth Amendment powers pursuant to *City of Boerne* and could not validly abrogate the Eleventh Amendment sovereign immunity of the States pursuant to *Seminole Tribe*.).

CONCLUSION

For the foregoing reasons, Petitioner The Board of Trustees of the University of Illinois respectfully requests the Court to grant this petition for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals in *Doe*.

Respectfully submitted,

The Board of Trustees of the University of Illinois

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APPENDIX

Jane **DOE**, a minor, John **Doe**, individually and as father and next friend of Jane **Doe**, and Janet **Doe**, individually and as mother and next friend of Jane **Doe**,
Plaintiffs-Appellees,

United States of America, Intervening Appellee,

v.

UNIVERSITY OF ILLINOIS,
a public corporation,

Defendant-Appellant.

Jane **DOE**, a minor, John **Doe**, individually and as father and next friend of Jane **Doe**, and JANET **DOE**, individually and as mother and next friend of Jane **Doe**,

Plaintiffs-Appellants,

v.

UNIVERSITY OF ILLINOIS, a public corporation,
Defendant-Appellee.

Nos. 96-3511, 96-4148

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 3, 1997.

Decided March 3, 1998
Rehearing and Suggestion for Rehearing En Banc
Denied April 14, 1998.

Before CUMMINGS, COFFEY and EVANS, Circuit Judges.*

CUMMINGS, Circuit Judge.

Appellee/cross-appellant Jane Doe was a student at University High School in Urbana, Illinois.[1] Although University High is a public school, it is affiliated with the defendant University of Illinois, which has responsibility for overseeing the school's administration. During a period from January 1993 through early May 1994, while a student at University High, Jane Doe was the victim of an ongoing campaign of verbal and physical sexual harassment perpetrated by a group of male students at the school. Doe and her parents complained on numerous occasions to officials of both the high school (including two successive school Principals, a counselor, the Assistant Director, and the person appointed as intake officer for sexual harassment complaints) and the University of Illinois (including two Vice Chancellors, two University police officials, the Ombudsperson, and the liaison person between the University and the high school), but

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* Because it conflicts with the decisions of other Circuits, this opinion has been circulated among all judges of this court in regular active service in accordance with Seventh Circuit Rule 40(e). A majority of judges did not favor rehearing en banc.

[1] Because the district court dismissed Doe's Title IX cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court must take as true all factual allegations in Doe's complaint and draw all reasonable inferences in her favor. *See Antonelli v. Sheahan*, 81 F.3d 1422, 1427 (7th Cir.1995). The facts stated in this opinion reflect that requirement.

those officials allegedly did not do nearly enough to combat the harassment.

Because the sufficiency of Doe's allegations of sexual harassment is not at issue on this appeal, it is not necessary to describe in detail the campaign of harassment and intimidation to which she was subjected by the self-styled "posse" of male students. It is enough to note here that according to the Magistrate Judge's Report and Recommendations, the male students' conduct included unwanted touching, epithets, and the deliberate exposure of one student's genitals in front of Doe. Although school officials did suspend two of the male students for ten days and transfer one student out of Doe's biology class, Doe claims that the school and the University took little or no meaningful action to punish the sexual harassment or to prevent further occurrences. Indeed, the complaint alleges that some administrators suggested to Doe that she herself was to blame for the harassment, and that it was she who ought to adjust her behavior in order to make it stop. On one occasion, University High's Assistant Director told Doe and two of her friends to start acting like "normal females" and scolded them for making allegations of harassment that might injure some of the male students' futures. Ultimately, Jane Doe's parents removed her from the school as a result of the campaign of harassment and sent her to a private high school in another state.

On May 24, 1995, Doe and her parents filed this suit against the University of Illinois and various individual officials of University High and the University of Illinois. They alleged violations of 20 U.S.C. §§ 1681 et seq. (Title IX) and of 42 U.S.C. § 1983, and sought damages under

the Illinois Family Expense Statute, 750 ILCS 65/15. After the plaintiffs voluntarily dismissed certain claims, Magistrate Judge David G. Bernthal entertained the defendants' motion to dismiss all of the remaining claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In a lengthy Report and Recommendations, he recommended that all of the remaining claims be dismissed. He further recommended that Jane Doe be granted leave to refile her claim against the University of Illinois for intentional sexual discrimination in violation of Title IX, but that all other claims be dismissed with prejudice.

In an order dated March 29, 1996, Chief Judge Mihm adopted the Magistrate Judge's Report and Recommendations and dismissed all claims, allowing Doe leave to refile her individual Title IX claim against the University.

On April 12, 1996, the University requested that the district court reconsider its decision to allow Doe to replead the Title IX claim, in light of the United States Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which had been made public on March 27, 1996. The University's motion for reconsideration asserted for the first time[2] that the Title IX claim against the University was barred by the Eleventh Amendment to the United

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[2] The University's Eleventh Amendment immunity defense is a question of the federal courts' subject matter jurisdiction over the action. The University was therefore entitled to raise the issue at any stage of the litigation. *See* Fed.R.Civ.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

States Constitution, because Title IX did not validly abrogate the States' (and thus the University's) sovereign immunity from suit. The district court denied the University's motion for reconsideration on September 25, 1996, holding that both Title IX and the statute that expressly subjected States to suit for violations of Title IX were enacted at least in part pursuant to Congress' powers under Section 5 of the Fourteenth Amendment, and therefore that Congress validly abrogated the States' sovereign immunity with respect to Title IX suits.

The University appeals the district court's rejection of its Eleventh Amendment defense. Plaintiff Jane Doe also appeals the court's dismissal of her Title IX claim against the University pursuant to Federal Rule of Civil Procedure 12(b)(6). On Doe's motion, the two appeals were consolidated. For the reasons set forth below, this Court affirms the district court's holding with respect to the University's Eleventh Amendment defense and reverses the court's holding with respect to Jane Doe's Title IX claim.

I. THE ELEVENTH AMENDMENT IMMUNITY ISSUE

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The University argues that it is immune from federal court suits under Title IX because it has not consented to such suits, and Congress has not validly abrogated its Eleventh Amendment immunity in the context

of Title IX. The district court disagreed, holding in its denial of the University's motion for reconsideration that Congress, in enacting Title IX and rendering it enforceable against the States (via the Equal Rights Remedies Equalization Act ("Equalization Act"), 42 U.S.C. § 2000d-7), had unequivocally and validly abrogated the States' sovereign immunity with regard to suits under Title IX.[3]

A. The Eleventh Amendment's Application to Federal Question Suits

Jane Doe argues in response to the University's immunity claim that the Eleventh Amendment does not give States immunity from federal question suits. Doe observes that the explicit text of the Amendment mentions only suits brought against a State by citizens of another State or of a foreign country. Based on this literal reading of the Amendment and a number of dissenting and concurring Supreme Court opinions, Doe urges this Court to hold that Eleventh Amendment immunity is not present in this case, which involves a federal question suit by a citizen of Illinois against the University of Illinois. Even were this Court inclined so to hold, however, it would not be free to do so. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54, 116 S.Ct. 1114, 1122, 134 L.Ed.2d 252, the Supreme Court reiterated its view that the Eleventh Amendment extends beyond its literal

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[3] The Equalization Act states in relevant part, "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of . . . title IX." 42 U.S.C. § 2000d-7(a)(1).

language to give the States sovereign immunity against all suits by individuals for damages. *See id.* at 53-54, 116 S.Ct. 1114 at 1122 (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1998)); *but see Seminole Tribe*, 517 U.S. at 83-85, 116 S.Ct. at 1137 (Stevens, J., dissenting) (arguing that Hans did not hold suits by citizens of the State to be sued barred by the Eleventh Amendment); *id.* at 101-03, 116 S.Ct. at 1146 (Souter, J., dissenting) (stating that Hans was incorrectly decided and that the Eleventh Amendment bars only diversity suits against States). Doe's contention that the Eleventh Amendment does not apply in this case is therefore without merit.

B. Abrogation of Eleventh Amendment Immunity

Congress may abrogate States' Eleventh Amendment immunity if it both unequivocally expresses its intent to do so and acts pursuant to a valid exercise of power. *Seminole Tribe*, 517 U.S. at 54-56, 116 S.Ct. at 1123. The University concedes, as it must, that Title IX and the Equalization Act, read together, unequivocally state Congress' intent to abrogate the States' Eleventh Amendment immunity, so the dispute centers around whether Congress acted pursuant to a valid exercise of power.

In *Seminole Tribe*, the Supreme Court held that the Indian Commerce Clause of the Constitution (art. I, § 8, cl.3) does not give Congress the power to abrogate the States' Eleventh Amendment immunity. *Id.* at 71-72, 116 S.Ct. at 1131. More broadly, the Court expressly overruled its prior decision that the Interstate Commerce Clause (art. I, § 8, cl.3) did give Congress the power to abrogate. *Id.* at 63-66, 116 S.Ct. at 1128 (overruling *Pennsylvania v.*

Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1). The Court stated that the powers granted to Congress in Article I of the Constitution could not be used to expand federal court jurisdiction under Article III at the expense of the States' Eleventh Amendment immunity. *Id.* at 72-74, 116 S.Ct. at 1132. The Court reaffirmed, however, the principle that Congress may abrogate the States' Eleventh Amendment immunity when it acts pursuant to Section 5 of the Fourteenth Amendment.[4] *Id.* at 58-60, 63-66, 116 S.Ct. at 1125, 1128 (*citing Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)). Because the Fourteenth Amendment was "adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution," it "operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 63-66, 116 S.Ct. at 1128. When acting pursuant to its powers under Section 5 of the Fourteenth Amendment, therefore, Congress can abrogate the States' immunity from suit.

Neither the Supreme Court nor this Court has resolved the question of whether Title IX was enacted pursuant to Congress' Section 5 powers. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n. 8, 112 S.Ct. 1028, 1038 n.8, 117 L.Ed.2d 208 (1992) (declining to decide "which power Congress utilized in enacting Title IX"); *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1028 (7th Cir.1997) (holding that "Title IX was

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[4] Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Amendment]."

passed pursuant to Congress' Spending Clause power" but not addressing possible alternative basis in Section 5). The district court in the present case held that Title IX, while it is undoubtedly an exercise of Congress' Article I Spending Clause power, was also enacted pursuant to Section 5 of the Fourteenth Amendment. The court further held that the Equalization Act, which expressly made the States subject to suits to enforce Title IX, "was clearly enacted pursuant to the Fourteenth Amendment." Relying upon this Court's decision in *EEOC v. Elrod*, 674 F.2d 601, 608 (7th Cir.1982), the district court stated the standard for determining whether a statute was enacted pursuant to the Fourteenth Amendment as "whether the objectives of the legislation are within Congress' power under the amendment." The court then concluded that "since the objective of Title IX is to prevent discrimination based on sex in federally funded programs and preventing discrimination is central to Congress' power under the Fourteenth Amendment, . . . Title IX was also enacted pursuant to § 5 of the Fourteenth Amendment."

The University of Illinois asserts here that Seminole Tribe and other Supreme Court decisions compel this Court to overrule Elrod and hold that the proper inquiry is not whether the statute at issue is within Congress' power under the Fourteenth Amendment, but rather whether Congress in fact enacted the statute pursuant to that power. Because neither Title IX nor its legislative history unambiguously states that Congress intended to act pursuant to Section 5 of the Fourteenth Amendment, [5]

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[5] In passing, however, it is worth noting that Jane Doe's briefs to this Court point out several instances in the legislative

the University reads the Supreme Court's holdings in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), and *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), as forbidding courts from inferring such an intent.

The University quotes at length from *Gregory* interpreting *Pennhurst* to hold that courts "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Gregory*, 501 U.S. at 469, 111 S.Ct. at 2405-06. The University argues that this principle from *Pennhurst* means that this Court should only find that Congress has enacted legislation pursuant to Section 5 when Congress has stated unambiguously that it intended to do so. This Court held in *Elrod*, however, that *Pennhurst* was inapposite to the inquiry into a statute's constitutional grounding in Section 5, primarily because it was a case involving statutory construction, rather than "congressional authority to legislate." *Elrod*, 674 F.2d at 608 n. 8.[6] In other words, the question in *Pennhurst* was whether Congress intended a particular result, regardless of the constitutional grant of power under which it acted. In the present inquiry, by contrast, the intended result (of subjecting States to suit for violations of Title IX's substantive provisions) is clear,

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history where members of Congress refer to Title IX as an extension of Fourteenth Amendment protections.

[6] *Gregory*, too, interpreted the substantive reach of a statute, rather than divining the source of Congress' power. The question in *Gregory* was whether Congress intended the Age Discrimination in Employment Act to apply to appointed state court judges. *See Gregory*, 501 U.S. at 455, 111 S.Ct. at 2398.

and the grant of power under which Congress acted is at issue.

Thus the University's reliance upon the *Gregory* Court's reading of *Pennhurst* to the effect that, "[b]ecause Congress nowhere stated its intent to impose mandatory obligations on the States under its § 5 powers, [the Court] concluded that Congress did not do so," is misplaced. What the *Pennhurst* Court held that Congress did not do was "impose mandatory obligations," not "[act] under its § 5 powers." The Supreme Court reached a similar conclusion in *EEOC v. Wyoming*, 460 U.S. 226, 244 n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983), where it held that *Pennhurst* was irrelevant "to the question of whether- . . . Congress acted pursuant to its powers under § 5," because, in terms of the substantive obligations imposed by the statute, "there [was] no doubt what the intent of Congress was."

The University identifies in the Supreme Court's decisions an "increasingly strict view of congressional waivers of sovereign immunity." In support of this proposition, it cites *Pennhurst*, *Gregory*, and *Seminole Tribe*. The University's reliance upon the former two cases is curious, given that neither decided an issue of sovereign immunity. It is, on the other hand, clear that *Seminole Tribe* contracted Congress' power to abrogate the States' Eleventh Amendment immunity. Neither that case nor any other, however, compels this Court to abandon the analysis employed in *Elrod*. Indeed, other courts of appeals, in decisions reached after *Seminole Tribe*, have adhered to an analysis very similar to that in *Elrod* for determining whether Congress acted pursuant to its Section 5 powers.

In *Crawford v. Davis*, 109 F.3d 1281 (8th Cir.1997), the Eighth Circuit explicitly held, as this Court does today, that Title IX was enacted pursuant to Section 5. *Id.* at 1283. In so deciding, the court articulated its inquiry as "whether Congress could have enacted the legislation at issue pursuant to a constitutional provision granting it the power to abrogate." *Id.* The court went on to state, "As long as Congress had such authority as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant." *Id.*

Similarly, the Sixth Circuit recently reaffirmed an earlier decision that the Equal Pay Act was enacted pursuant to Section 5. *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838-839 (6th Cir.1997) (*citing Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116, 119 (6th Cir.1978)). The court recognized that Congress made no explicit statement of the constitutional basis for its legislation, but held that "[i]t was not necessary for Congress to expressly rely on § 5 in exercising its power because such power clearly existed." *Id.* at 839 (citation omitted). The Sixth Circuit in *Timmer* confronted the same arguments the University raises in this case – that some combination of the Supreme Court holdings in *Pennhurst* and *Seminole Tribe* required a "clear statement" from Congress before a court could find that Congress acted pursuant to Section 5. The Sixth Circuit rejected those arguments, and this Court agrees with both its reasoning and its conclusion. *See also Clark v. California*, 123 F.3d 1267, 1270 (9th Cir.1997) (stating that for Eleventh Amendment abrogation purposes, "a statute is 'appropriate legislation' to enforce the Equal Protection Clause if the statute 'may be regarded as an enactment to enforce the Equal Protection

Clause, [if] it is plainly adapted to that end and [if] it is not prohibited by but is consistent with the letter and spirit of the constitution' ") (*quoting Katzenbach v. Morgan*, 384 U.S. 641, 651, 86 S.Ct. 1717, 1723-24, 16 L.Ed.2d 828).

Aside from the decisions of other circuits utilizing an approach very similar to that in *Elrod*, there is nothing odd in the proposition that Congress may have acted pursuant to more than one of its sources of power in enacting a single piece of legislation. In *Elrod* itself, this Court observed that the statute at issue there, the Age Discrimination in Employment Act, "follows the familiar pattern of contemporary civil rights acts in grounding prohibitions against private parties in the Commerce Clause, while reaching government conduct by the more direct route of the Fourteenth Amendment." *Elrod*, 674 F.2d at 604; *see also Fullilove v. Klutznick*, 448 U.S. 448, 473, 100 S.Ct. 2758, 2772, 65 L.Ed.2d 902 (finding that Congress used an "amalgam" of its powers in enacting minority business enterprise provision of Public Works Employment Act of 1977), overruled on other grounds by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158. It is equally sensible that Congress, in using federal educational funds as the core of Title IX, should use its Spending Clause powers to reach private actors and its Fourteenth Amendment powers to reach the States.

This conclusion answers the argument of the Fifth Circuit that Title IX's use of federal funds as a lever to insure compliance with its antidiscrimination objectives indicates that Congress could not have been acting under its Fourteenth Amendment powers. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1012 n. 14 (5th Cir.1996)

(noting that imposing Title IX liability on a school that receives federal but not State funds would "push the limits of the Fourteenth Amendment"), *certiorari denied*, ___ U.S. ___, 117 S.Ct. 165, 136 L.Ed.2d 108. A chronological perspective reinforces this view. It is not at all unlikely that Congress, perceiving the possible limits upon its Fourteenth Amendment power over non-State actors, initially chose to use its Spending Clause power to bind such actors to the requirements of Title IX. When Congress subsequently chose, via the Equalization Act, to make those same strictures more readily enforceable against State-run schools, it used the already existing federal funds framework of Title IX. Congress' consistent use of federal funds as the "trigger" for Title IX coverage, however, does not mean that it did not also intend to act pursuant to its acknowledged powers over State actors granted by Section 5 of the Fourteenth Amendment. The Fifth Circuit's approach would turn a purely efficient decision to utilize an existing statutory scheme into a declaration that the Fourteenth Amendment was not involved in an enactment that, at least as it applies against the States, is squarely within the purview of that Amendment.

This Court, therefore, reaffirms the analysis we used in *Elrod* and applies it here. The appropriate question is, were "the objectives of [Title IX] . . . within Congress' power under the [Fourteenth] amendment?" *See Elrod*, 674 F.2d at 608. The answer is, quite plainly, that they were. As the court below noted (*quoting Cannon v. University of Chicago*, 441 U.S. 677, 678, 99 S.Ct. 1946, 1948, 60 L.Ed.2d 560 (1979)), protecting Americans against "invidious discrimination of any sort, including that on

the basis of sex," is a central function of the federal government. Prohibiting "arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Elrod*, 674 F.2d at 604. Title IX prohibits such discriminatory government conduct on the basis of sex when it occurs in the context of State-run, federally funded educational programs and institutions. This Court holds, therefore, that Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment. For that reason, Congress validly abrogated the States' Eleventh Amendment immunity from suit when it passed the Equalization Act expressly making States subject to suits to enforce Title IX.

In light of the foregoing conclusion that Congress validly abrogated the States' immunity, it is unnecessary to resolve Jane Doe's alternative claim that the University affirmatively waived its Eleventh Amendment immunity by choosing to accept federal funds under Title IX.

II. THE TITLE IX ISSUE

A. Standard for Reviewing Motion to Dismiss

In reviewing a grant of dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, this Court must take as true all factual allegations in the plaintiff's pleadings and draw all reasonable inferences in her favor. *Antonelli v. Sheahan*, 81 F.3d 1422, 1427 (7th Cir.1996). Such a motion may be granted only if it appears beyond a doubt from

the pleadings that the plaintiff is unable to prove any set of facts that would entitle her to relief. *Moss v. Healthcare Compare Corp.*, 75 F.3d 276, 279 (7th Cir.1996). We review the district court's grant of a motion to dismiss de novo. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 419 (7th Cir.1994).

B. Title IX Background

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. As noted in Part I above, the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1), expressly made the States subject to suits to enforce the guarantees of Title IX.

It is well settled that sexual harassment of a student in a federally funded educational program or activity, if it is perpetrated by a teacher or other employee of the funding recipient, can render the recipient liable for damages under Title IX. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64, 76, 112 S.Ct. 1028, 1031-32, 1038, 117 L.Ed.2d 208; *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1021 (7th Cir.1997). What is less clear, and what is before this Court today, is whether a school (or other educational fund recipient) can be liable for failing to take prompt, appropriate action to remedy known sexual harassment of one student by other students. Three courts of appeals have considered the question, with two finding no liability, *see Davis v. Monroe*

County Bd. of Educ., 120 F.3d 1390 (11th Cir.1997) (en banc); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.1996), *certiorari denied*, ___ U.S. ___, 117 S.Ct. 165, 136 L.Ed.2d 108, and one finding such liability if the school knew or should have known that the harassment was occurring, *see Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir.1997). Further, a number of district courts have found such liability to exist under Title IX. *See, e.g., Doe v. Londonderry Sch. Dist.*, 970 F.Supp. 64, 74 (D.N.H.1997); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F.Supp. 1369, 1377 (N.D.Cal.1997); *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F.Supp. 162, 173 (N.D.N.Y.1996); *Wright v. Mason City Community Sch. Dist.*, 940 F.Supp. 1412, 1419-1420 (N.D.Iowa 1996); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F.Supp. 1006, 1023 (W.D.Mo.1995).

The district court in the present case, ruling without consideration of any court of appeals decisions on the issue,[7] held that the University could be liable for failing to take action to address Doe's harassment, but only if Doe alleged (as the court believed she had not done) that

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[7] The district court's Order dismissing Doe's Title IX claim was issued on March 29, 1996. The Fifth Circuit decided *Rowinsky*, 80 F.3d at 1006, four days later, on April 2. The Eleventh Circuit's panel decision in *Davis v. Monroe County Board of Education*, 74 F.3d 1186 (11th Cir.1996), which found liability without the necessity of pleading that school officials were motivated by discriminatory intent, was issued on February 14, 1996, but the district court did not mention the case in its Order. The Davis panel decision was subsequently vacated, 91 F.3d 1418 (11th Cir.1996) (granting rehearing en banc and vacating panel decision), and the full Circuit reached the contrary result discussed in the text.

school and University officials' failure to respond "resulted from the University's sexual discrimination against her." In other words, the court held that the University's allegedly intentional failure to act in the face of knowledge of the sexual harassment was not sufficient to sustain Title IX liability; in the court's view, Doe needed to allege that the failure arose out of an intent by the University to discriminate on the basis of sex.

For reasons set forth below, this Court holds that a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place. We reject the district court's further requirement that plaintiffs in such cases plead or prove that the recipient, or any of its officials, failed to respond as a result of sexually discriminatory intent. The failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex, and so, once a plaintiff has alleged such failure, she has alleged the sort of intentional discrimination against which Title IX protects.

C. Title IX Liability

Because today's holding is inconsistent with the decisions of two of the three other courts of appeals that have directly addressed the issue, it is appropriate that this Court should explain the grounds for its disagreement with those decisions. The Fifth Circuit in *Rowinsky*, 80

F.3d at 1006, held that a school's alleged failure to respond sufficiently to sexual harassment of a student by other students could not incur liability under Title IX. The court considered the pertinent question to be whether the school could be held liable for the acts of third persons (the harassing students) who were not its agents. *See id.* at 1011 (noting that when a student is the harasser, "a theory of respondeat superior has no precedential or logical support"); *id.* at 1012 (stating that Title IX's language "does not support an inference that the statute applies to the conduct of third parties" and noting factors that weigh in favor of imposing liability "only for the acts of grant recipients").

As a result of this analysis, the *Rowinsky* court concluded that the only way in which the plaintiff could state a cause of action under Title IX based on sexual harassment by other students would be by showing "that the school district responded to sexual harassment claims differently based on sex" by, for instance, "treat[ing] sexual harassment of boys more seriously than sexual harassment of girls." *Id.* at 1016. Such a showing, the court believed, would be sufficient to show that the school itself discriminated on the basis of sex in its response to the complaints.

With respect, the Fifth Circuit's analysis fundamentally misunderstands the nature of the claim that plaintiffs in this kind of case advance. *See Doe v. Petaluma City Sch. Dist. (Petaluma II)*, 949 F.Supp. 1415, 1421 (N.D.Cal.1996). Jane Doe does not ask that the defendant be held liable for the acts of the harassing students; rather, she asks that it be held liable for its own actions

and inaction in the face of its knowledge that the harassment was occurring. Were Doe in fact requesting that the harassing students' actions be imputed to the University under agency principles, then her claim would be properly dismissed. *See Smith*, 128 F.3d at 1034 ("Agency principles . . . cannot impute discriminatory conduct of an employee to the 'program or activity' " under Title IX.). Instead, Doe alleges that responsible school and University officials knew of the harassment and failed to take measures to address it. "Thus, [the alleged] institutional liability rest[s] on the institution's actions" rather than those of the harassers. *Id.* at 1022 (discussing *Franklin*, 503 U.S at 60, 112 S.Ct. at 1028-30). The Fifth Circuit's agency-based analysis, therefore, does not resolve the issue.

Moreover, the *Rowinsky* court's demand that a plaintiff such as Jane Doe, in order to state a Title IX cause of action, allege and show that the school reacted differently to sexual harassment claims made by girls and boys misunderstands sexual harassment itself. This Court has noted in the Title VII context that the arguments underpinning the *Rowinsky* requirement "interpret sex discrimination in too literal a fashion." *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir.1996). As we recognized in that case, occasional exceptions do not alter the rule that sexual harassment is an evil that affects mostly women and girls. For this reason, it must be exceedingly rare that a school receives any complaints of sexual harassment from its male students. The Fifth Circuit's rule would leave schools completely free to ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore any complaints they might

receive from their male students. *See Petaluma II*, 949 F.Supp. at 1421.

1. The Eleventh Circuit's Spending Clause Analysis

Apparently recognizing these fatal flaws of the *Rowinsky* opinion, the Eleventh Circuit in its en banc opinion in Davis took care not to characterize the issue as one of liability for the acts of third parties. It also did not echo the dictum that a plaintiff could only state a claim by showing differential treatment of complaints by boys and girls. The court properly recognized that the school's allegedly discriminatory conduct lay in "fail[ing] to take measures sufficient to prevent a non-employee from discriminating against [the plaintiff]." *Davis*, 120 F.3d at 1401. With this understanding, the court proceeded to analyze whether a school could properly face Title IX liability for such a failure.

The Davis court began by finding that Title IX was enacted pursuant to the Spending Clause of the Constitution (art. I, § 8, cl.1). *See id.* at 1398. From that premise, it next concluded that the proper inquiry to determine whether the school could be held liable was "whether Congress gave the [school] Board unambiguous notice that it could be held liable for failing to stop [the] harassment." *Id.* at 1399. This Court held in Part I above that Congress enacted Title IX and applied it to the States pursuant to its powers under both the Spending Clause and Section 5 of the Fourteenth Amendment. While the Eleventh Circuit's approach is certainly relevant, it is not sufficient to conclude the inquiry.

In its Spending Clause analysis, the Eleventh Circuit correctly observed that "[w]hen Congress enacts legislation pursuant to the Spending Clause, it in effect offers to form a contract with potential recipients of federal funding." *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539-[illegible] 67 L.Ed.2d 694). As a general matter, the result of this [illegible]ntractual analogy is that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1539-40. In light of this requirement, the Eleventh Circuit inquired whether the defendant school board had been unambiguously put "on notice" that it might be liable for failing to respond to sexual harassment that it knew was taking place.

By relying upon the unambiguous statement rule of *Pennhurst*, the Eleventh Circuit ignored a more recent Supreme Court holding on the matter. In *Franklin*, 503 U.S. at 74-75, 112 S.Ct. at 1037-38, the Court held that where the discrimination alleged to have violated Title IX is intentional, the "notice problem does not arise." *See Davis*, 120 F.3d at 1414 (Barkett, J., dissenting). Title IX, the Supreme Court held, placed on schools the duty not to discriminate on the basis of sex; when a school violated that duty, it could be held liable despite the fact that the Court had not previously imposed a similar remedy for the kind of Title IX violation at issue. *See Franklin*, 503 U.S. at 75, 112 S.Ct. at 1037-38 (holding monetary damages remedy against school district appropriate where school officials knew about teacher's sexual harassment and abuse of student).

In the case before the Court today, Jane Doe alleges that University High's failure or refusal to take prompt

and appropriate action in response to her complaints of sexual harassment was intentional sexual discrimination. In other words, the allegation assumes that the combination of knowledge that sexual harassment is occurring in activities under the school's control and intentional failure to take prompt, appropriate action (such as investigation and, if warranted, disciplinary measures) is presumably, perhaps even necessarily, a manifestation of intentional sex discrimination. *See Smith*, 128 F.3d at 1028 (noting that "a School District or School Board that 'knew' and failed to respond to sex discrimination would act with the intent required to suffer a monetary judgment under the Spending Clause"); *id.* at 1042 (Coffey, J., concurring) (same). After all, what other good reason could there possibly be for refusing even to make meaningful investigation of such complaints, as Jane Doe alleges University High officials did in this case?

School and University officials were unquestionably aware that Title IX subjected the school to liability for intentionally discriminating against or denying educational benefits to students on the basis of sex. There is also no question that the campaign of harassment that Doe alleges was sufficient to deny her the full benefit of her education and subject her to discrimination at the school. If, as alleged, school and University officials knew about the harassment and intentionally failed, and indeed flatly refused in some instances, to take steps to address it, then the plea that the institution was not "on notice" that such failure could subject it to Title IX liability rings hollow.

2. Fourteenth Amendment Analysis

Part I of this opinion held that Congress enacted Title IX and extended it to the States in part pursuant to Section 5 of the Fourteenth Amendment. In so holding, this Court concluded that the Supreme Court's admonition in *Pennhurst* against "quickly attribut[ing] to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment," *Pennhurst*, 451 U.S. at 16, 101 S.Ct. at 1539, was not pertinent to resolving the question under which of its powers Congress acted in passing and extending Title IX. The warning in *Pennhurst* is, however, most certainly relevant to the present inquiry, which is whether Title IX imposes upon recipients liability for certain types of actions or inactions.

In *Pennhurst*, the Supreme Court declined to conclude that Congress, in passing the Developmentally Disabled Assistance and Bill of Rights Act, had intended to use its Section 5 powers to impose an obligation on States to provide and pay for certain kinds of treatment to the mentally disabled. *Id.* at 15-17, 101 S.Ct. at 1538-40. The Court noted that previous cases in which it had found that Congress did create rights and obligations pursuant to Section 5 involved express articulations of intent by Congress. *Id.* at 16, 101 S.Ct. at 1539. The Court further stated that "[t]he case for inferring intent [to create enforceable rights] is at its weakest where . . . the rights asserted impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17, 101 S.Ct. at

1539-40. The Court contrasted such impositions of affirmative obligations with statutes that "simply prohibit[ ] certain kinds of state conduct." *Id.* at 16, 101 S.Ct. at 1539; *see Illinois Dep't of Public Aid v. Sullivan*, 919 F.2d 428, 434 (7th Cir.1990) (finding that *Pennhurst* did not bar imposition of prohibitions on State, in part because "[t]he regulations in question . . . imposed no new, affirmative obligations on [the State]").

The right Jane Doe asserts in this case would impose no affirmative funding obligations on the States. It would merely prohibit States, in their capacity as administrators of educational programs receiving Title IX funds, from failing to respond to sexual harassment that they knew was occurring. Cf. *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 840-841 (6th Cir.1997) (inferring intent to enact Equal Pay Act pursuant to Fourteenth Amendment powers in part because it "simply prohibit[s] certain kinds of state conduct," rather than imposing financial obligations).

In any event, this Court does not read *Pennhurst* to stand for the proposition that Congress may never impose duties upon the States pursuant to Section 5 of the Fourteenth Amendment in the absence of a clear, unambiguous statement that it is imposing those precise duties. Clarity in legislative drafting is a goal to which this Court willingly subscribes. Congress need not, however, spell out in advance every situation to which it wishes a statute to apply. As we observed nearly a decade and a half ago, the question of whether Congress created enforceable rights in the first instance is very different from questions concerning "the scope and interpretation" of those rights. *American Hosp. Assoc. v. Schweiker*, 721 F.2d

170, 183 (7th Cir.1983) (upholding community service and uncompensated care requirements imposed on federally funded hospitals by Department of Health and Human Services regulations pursuant to Hill-Burton Act), *certiorari denied*, 466 U.S. 958, 104 S.Ct. 2169, 80 L.Ed.2d 553. This Court noted in *Schweiker* that the defendant hospitals conceded that the statute created enforceable obligations; only the scope of the obligations was at issue. *See id.* Similarly, no party to the present case could seriously dispute that Title IX imposes obligations upon schools that receive federal funds to avoid discrimination on the basis of sex, or that students such as Jane Doe may sue to enforce those obligations. The issue is whether those obligations' scope is wide enough to include the kind of liability Doe seeks to impose. *Pennhurst* is not a bar to inquiry into that question. If the language and history of Title IX and its extension to the States fairly support liability under the theory Jane Doe advances, then this Court may conclude that Congress acted pursuant to Section 5 of the Fourteenth Amendment to impose such liability.

In its Spending Clause inquiry, the Eleventh Circuit looked primarily to the express terms and legislative history of Title IX. Finding no mention in the legislative history of student-on-student sexual harassment "or the related issue of school discipline," *Davis*, 120 F.3d at 1397, the court concluded that schools were not "on notice" that they might be held liable for failing properly to address sexual harassment by students, *id.* at 1401.[8]

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[8] In sections of the en banc opinion not joined by any other judge, the author of the majority opinion, Judge Tjoflat, went on

Although we have concluded herein that Title IX is not exclusively a Spending Clause enactment (and that the notice issue does not arise, given the intentional nature of the discrimination alleged), the *Davis* court's analysis of whether the statute imposes liability provides a starting point for our Fourteenth Amendment inquiry. Unfortunately, the Eleventh Circuit made the mistake of focusing too narrowly on the statute and the legislative history, ignoring both case law and the meaning attached to Title IX by the federal agency responsible for its enforcement. As the dissenting judges in *Davis* observed, the language and legislative history of Title IX do not deal with teacher-on-student sexual harassment, any more than they do student-on-student harassment. *See id.* at 1413-1414 (Barkett, J., dissenting). Yet the Supreme Court has explicitly recognized that Title IX creates a cause of action based upon teacher-on-student sexual

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to state that the possibility of schools' being subject to what he called "whipsaw liability" was a further indication that Title IX did not put schools on notice that they might face liability under the circumstances of the case. *Davis*, 120 F.3d at 1401. By "whipsaw" liability, Judge Tjoflat meant the danger that a school might be sued by a harassed victim if it failed to take action against the harasser, but might then be sued by the harasser if it expelled or otherwise punished him (or her). *See id.* at 1401-1406. As these statements do not represent the opinion of the court, it is not necessary to address them at length. It is worth pointing out, however, that other Congressional enactments in the anti-discrimination field subject parties to the possibility of similar dual liabilities. Under Title VII, for instance, an employer might face suit from a harassed employee if it fails to take steps to remedy a hostile environment, but might also be sued by the harasser (for instance, for wrongful termination) if it disciplines him.

harassment. *See Franklin*, 503 U.S. at 60, 112 S.Ct. at 1028-30.

Indeed, the very principle that Title IX confers a private right of action for any sort of violation was not explicit in the text or legislative history; it became law only when the Supreme Court decided that Title IX implied such a right of action. *See Cannon v. University of Chicago*, 441 U.S. 677, 688-689, 99 S.Ct. 1946, 1953, 60 L.Ed.2d 560; *see also Franklin*, 503 U.S. at 71, 112 S.Ct. at 1035-36 (noting that, given fact that right of action was inferred by Court in Cannon, prior legislative history and statutory text were not helpful in deciding whether money damages were available). This Court must, therefore, look to judicial decisions to help it determine whether Title IX imposes liability for the University's failure to address appropriately sexual harassment by its students.

The Supreme Court has declared that Title IX is to be given "a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 1917-18, 72 L.Ed.2d 299 (1982). That language, in turn, speaks in terms of safeguarding individual students' rights: "No person . . . shall be excluded . . . , be denied . . . benefits . . . , or be subjected to discrimination. . . . " 20 U.S.C. § 1681. As the dissenting judges in *Davis* pointed out, "[t]he absolute prohibition contained in the text is framed solely in terms of who is protected." *Davis*, 120 F.3d at 1412 (Barkett, J., dissenting). Giving this statutory language the "broad sweep" required by *North Haven* certainly supports the proposition that a school may be liable for refusing to act upon its responsibility to operate

a program in which all persons are free from the kind of exclusion and discrimination the statute forbids.

Beyond interpretation of the statutory language itself, however, federal courts look to cases decided under Title VII to inform analysis under Title IX. *See, e.g., Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir.1994); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896-897 (1st Cir.1988); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n. 6 (10th Cir.1987), *certiorari denied*, 484 U.S. 849, 108 S.Ct. 148, 98 L.Ed.2d 104. Although Title VII is most closely analogous to Title IX actions involving discrimination against educational employees, *see Preston*, 31 F.3d at 206, Title VII cases are also helpful in addressing other claims of sexual discrimination under Title IX. *See, e.g., Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-249 (2d Cir.1995) (applying Title VII analysis to student's Title IX claim against school involving sexual harassment by teacher). The very definition of sexual harassment that is implicit in this discussion and that of the other courts that have addressed it in the educational context comes from Title VII. *See Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405-06, 91 L.Ed.2d 49 (defining actionable sexual harassment under Title VII). The Supreme Court, in recognizing that sexual harassment of students by teachers could give rise to a Title IX cause of action against the school, cited *Meritor*, a Title VII case. *See Franklin*, 503 U.S. at 75, 112 S.Ct. at 1037-38. Broadly speaking, there is no reason why students such as Jane Doe should be afforded a lesser degree of protection against such "hostile environment" discrimination than

adult workers in the employment setting regulated by Title VII.

This Court recently held that, because of differences in the language and history of Title IX and Title VII, cases decided under the latter should not be construed to impose Title IX liability upon schools for the acts of their employees on the basis of agency principles. *See Smith*, 128 F.3d at 1034. Jane Doe's argument in this case uses Title VII cases for a different purpose, however – to support the conclusion that schools may be held directly liable under Title IX for their own failure to respond appropriately to sexual harassment of which they have actual knowledge. Such failure, Doe contends, renders the University directly liable for its own intentional discrimination on the basis of sex. Thus the holding in *Smith* that Title VII agency-based principles do not apply in Title IX cases does not preclude our use of Title VII precedents here.

One problem with borrowing so liberally from Title VII law in interpreting Title IX may be that under Title VII prospective litigants are required to proceed through a federal administrative agency, the Equal Employment Opportunity Commission (EEOC), before filing suit in federal court.[9] *See Patterson v. McLean Credit Union*, 491

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[9] The EEOC reviews Title VII complaints of unlawful employment practices to determine whether reasonable cause exists to believe the charges are true. 42 U.S.C. § 2000e-5(b). If it determines that such cause does exist, the EEOC must "endeavor to eliminate any . . . alleged unlawful employment practice by informal methods." *Id.* The EEOC is empowered to institute civil suits itself or refer cases to the Attorney General

U.S. 164, 180, 109 S.Ct. 2363, 2374, 105 L.Ed.2d 132 (1989). This requirement is intended to promote the resolution of unlawful employment practice claims "through conciliation rather than litigation." *Id.* Because no comparable administrative review mechanism exists for suits filed under Title IX, one might infer that Congress did not contemplate that courts would recognize as broad a range of causes of action under Title IX as under Title VII. Perhaps the absence of agency review means that this Court should not look to Title VII cases to inform its analysis of Jane Doe's Title IX claim.

On the other hand, private citizens have possessed a right to bring suit under Title IX for over eighteen years. *See Cannon*, 441 U.S. at 688-689, 99 S.Ct. at 1953. For at least five of those years, students have had a cause of action against schools based on sexual harassment by school employees. *See Franklin*, 503 U.S. at 63-64, 76, 112 S.Ct. at 1031-1032, 1038. As noted above, for much of that time courts, including the Supreme Court, have been using Title VII precedent in analyzing Title IX suits. In all those years, Congress has not seen fit to institute a requirement of administrative review or conciliation for private suits under Title IX. Yet nothing indicates that the federal courts have seen an overwhelming flood of such suits. Nor does the species of Title IX liability for which

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for action. *Id.* § 2000e-5(f)(1). If the EEOC does not institute such a suit or refer the case, or if it determines that reasonable cause does not exist to support the charges, it must dismiss the case and notify the complaining party that he or she has the right to sue in federal court. *Id.* In addition, the EEOC in many cases is required to give State enforcement agencies an opportunity to resolve the dispute. *See id.* §§ 2000e-5(c)-(d).

Jane Doe asks in this case threaten to produce such a flood. Courts are free to use the means provided by Federal Rules of Civil Procedure 12 and 56, among others, to dispose of suits that lack merit. Congress, for its part, is free to impose a requirement comparable to the one under Title VII if it so desires. The absence of an administrative review requirement does not discourage the use of Title VII precedents in cases under Title IX.

Under Title VII standards, "an employer who has reason to know that one of his employees is being harassed in the workplace by others on grounds of race, sex, religion, or national origin, and does nothing about it, is blameworthy." *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir.1986). So long as the harassment is such that "the employer could have prevented [it] by reasonable care in hiring, supervising, or if necessary firing the [harasser]," the employer is "directly liable (that is, independently of respondeat superior)." *Id.* Translated to the Title IX setting, this standard would mean that the University is liable for harassment by its students, regardless of the fact that students are not agents of the school, so long as it knew or had reason to know about the harassment and could have prevented some or all of it by taking appropriate action in response. The absence of an agency relationship is simply irrelevant, given our holding that the liability Jane Doe seeks is direct, rather than agency-based. Although we do not adopt, for the reasons given in *Smith*, 128 F.3d at 1028-1029, the Title VII "knew or should have known" standard articulated in cases such as *Hunter*, we do borrow that case's theory of direct liability.

This view of Title IX liability also takes into account the interpretations of the Department of Education's Office of Civil Rights (OCR), the federal agency charged with enforcing Title IX. Although OCR's interpretation of Title IX is not entitled to strict deference from this Court, *see id.* at 1033-1034, it merits our consideration. The OCR's final policy guidance on the matter states:

> [A] school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed.Reg. 12,034, 12,039-12,040 (1997).

The Eleventh Circuit's opinion in *Davis* ignored this policy statement (although Judge Tjoflat addressed it in a footnote to the portion of the opinion that is his alone, *see Davis*, 120 F.3d at 1404 n. 23 (noting that the guidelines "issued after the alleged harassment" in the case)). It is certainly relevant that the OCR's final Guidance had not been issued at the time the harassment was taking place. The Guidance, however, reflects longstanding OCR policy, as demonstrated by official Letters of Finding dating

as far back as 1989. The Fifth Circuit in *Rowinsky* determined that such Letters are not entitled to deference, as they "are promulgated during investigations of specific institutions, and their purpose is to compel voluntary compliance by an offending institution." *Rowinsky*, 80 F.3d at 1015. Where, as here, the Letters of Finding consistently indicate that, in the words of one of them, "[a] district which is aware that its students are being subjected to sexual harassment has a duty under Title IX to take prompt and effective action to stop it," Letter of Finding of John E. Palomino, Regional Civil Rights Director, Region IX (May 5, 1989), Docket No. 0989-1050, there is no reason not to consider the Letters as evidence that the later Policy Guidance did indeed reflect long-existing OCR policy.

It is clear, then, that Title VII case law and the interpretations of the responsible federal agency support the imposition of Title IX liability for the University's failure to respond promptly and appropriately to the sexual harassment of Jane Doe. Furthermore, imposing such liability best serves the anti-discrimination goal that Congress indisputably had in mind when it enacted Title IX and made it binding upon the States. Accordingly, this Court holds that Title IX does make schools liable for failure to respond promptly and appropriately to known student-on-student sexual harassment.

In holding that schools have a duty to take prompt and appropriate action to remedy student-on-student sexual harassment, this Court does not imply that schools must be successful in completely eradicating sexual harassment from their campuses and programs. School officials faced with knowledge of sexual harassment must

decide how to respond, but their choice is not a binary one between an obviously appropriate solution and no action at all. Rather, officials must choose from a range of responses. As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.

D. Proper Standard for Notice that Harassment is Occurring

The holding that a school can be liable for failing to respond appropriately to sexual harassment makes it necessary to determine what constitutes sufficient notice to the school that such harassment is taking place. One court of appeals and one district court, borrowing from the Title VII context, have held that a school is liable for failing properly to address harassment that it actually knew or should have known was occurring. *Brzonkala*, 132 F.3d at 949; *Petaluma II*, 949 F.Supp. at 1427. Several other district courts, in contrast, have adopted a standard that requires plaintiffs to allege and prove that the school officials actually knew of the harassment (rather than that they should have known). *See Londonderry Sch. Dist.*, 970 F.Supp. at 74; *Bruneau*, 935 F.Supp. at 173; *Wright*, 940 F.Supp. at 1419-1420; *Bosley*, 904 F.Supp. at 1023.

In *Smith*, this Court rejected Title IX liability for teacher-on-student sexual harassment based on a "knew

or should have known" standard and adopted instead a requirement of actual knowledge. *Smith*, 128 F.3d at 1034 (holding that school district can be liable "only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so") (*quoting Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir.1997)). We see no reason to adopt a different standard for cases, such as this one, in which the alleged harassment is student-on-student.

The actual knowledge standard is sufficient to resolve the case before the Court today, because Doe alleged that the University actually knew of the campaign of harassment against her. Indeed, counsel for the University conceded at oral argument that school officials knew of at least some of the incidents of sexual harassment. The parties agree that school officials on one occasion suspended some of the male students involved and took other actions in response to the harassment. Such responses preclude any argument that the officials did not have actual knowledge.

Furthermore, the requirement of actual knowledge is an appropriate limitation upon the liability to which suits based on student-on-student harassment subject schools. It will prevent schools from being blind-sided by liability based upon events that officials did not even know were taking place. Such a requirement does not place too severe a burden on potential plaintiffs. All that is required is that they report the alleged harassment to responsible school officials, thus giving the school a chance to respond before it is hauled into court.

CONCLUSION

Jane Doe has alleged that she was subjected to hostile environment sexual harassment. As noted above, Doe also alleged (and the University concedes) that school and University officials had actual knowledge of that harassment. In addition, Doe has alleged facts that would allow a jury to find that the University failed to respond promptly and appropriately to her complaints.

For the reasons set forth in Part I of this opinion, the district court's denial of the University's motion to reconsider on the basis of Eleventh Amendment immunity is affirmed. Because the plaintiff, Jane Doe, alleged facts sufficient to support each element of her claim that the University violated Title IX, the district court's dismissal of her Title IX cause of action against the University pursuant to Federal Rule of Civil Procedure 12(b)(6) is hereby reversed. The case is remanded to the district court for further proceedings consistent with this opinion.

COFFEY, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's conclusion but not in its reasoning; I dissent from the majority's standard of liability. Title IX does impose liability upon fund recipients for failing to take prompt, appropriate remedial action in response to complaints of student-on-student sexual harassment, provided that responsible officials had actual knowledge of such harassment. But only those remedial actions which clearly evidence intentional discrimination are actionable under Title IX. See *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1028 (7th Cir.1997). Doe's facts as

pleaded are sufficient to state a claim within this standard. I write separately in an attempt to clarify certain ambiguities in the majority opinion, and at the same time raise several concerns about the analysis set forth therein. As the majority notes, we are only the second federal appellate court to date to impose Title IX liability in the context of peer-on-peer harassment; two other circuits, the Fifth and Eleventh, have rejected the concept altogether, see *Davis v. Moore County Bd. of Educ.*, 120 F.3d 1390 (11th Cir.1997) (en banc); *Rowinski v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 165, 136 L.Ed.2d 108 (1996), and the "actual knowledge" test we adopt today is markedly different from the Fourth Circuit's negligence-based "knew or should have known" standard of liability. See *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997).[1] This is indeed a most contentious area of the law, one deserving of great scrutiny and forethought. I fear that the majority has perhaps been too hasty in interpreting Title IX when the financing of our nation's public educational institutions hangs in the balance due to limited tax dollars.

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[1] The majority *incorrectly* states that "today's holding is inconsistent with the decisions of two of the three other courts of appeals that have directly addressed the issue" of Title IX liability for student-on-student sexual harassment. Maj. Op. at 661. Because this court has adopted the aforementioned "actual knowledge" test in Title IX cases, our holding should be contrasted with, as opposed to likened to, all three of the decisions of those circuits, as neither the Fifth nor Eleventh circuit recognizes Title IX liability for peer-on-peer harassment, while the Fourth Circuit implores a negligence-based "knew or should have known" standard.

The statutory language itself should be the starting point in resolving any controversy arising under a federal statute. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . . " 20 U.S.C. § 1681(a) (1990). And while the peer-on-peer harassment issue implicated in this case is one of first impression for this Circuit, we have previously been called upon to interpret Title IX in a different context. In *Smith v. Metropolitan Sch. Dist. Perry Township*, decided by this Court a mere few months ago, we concluded that "a school district can be liable for teacher-student sexual harassment under Title IX only if a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." 128 F.3d at 1034 (emphasis added) (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 660 (5th Cir.1997)). Admittedly, teacher-on-student harassment and student-on-student harassment are of an entirely different species.[2] Nevertheless, Smith is helpful as a guide

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[2] As we all know, public school systems can pick and choose to employ whomever they wish as teachers and "filter out" any applicants with histories of sexual misconduct, while on the other hand they must educate every qualified child within their respective districts. Moreover, whereas adult educators have, or should have, the emotional maturity and experience to know what type of conduct oversteps the bounds of socially acceptable behavior, children, because of their youth, more often than not do not have the ability to exercise such sound judgment.

for determining when and if a school district might be held liable for one student's sexual harassment of another.

In *Smith*, Steve Rager, a male teacher at Southport High School in Indianapolis, Indiana, engaged in a sexual relationship with Heather Smith, then a seventeen-year-old female senior at Southport. After graduating, Smith apprised her parents of the affair and they, in turn, reported it to school officials. Two days later, Rager was suspended, informed that his services were no longer desired, and told that his teaching license would be terminated if he did not resign forthwith. Rager promptly submitted his resignation. Thereafter, the school district sent a letter to the Indiana State Board of Education recommending the revocation of Rager's teaching license. In the wake of these events, Smith brought suit against, among other parties, the Metropolitan School District Perry Township ("Metropolitan"), alleging that the district discriminated against her in violation of Title IX because school officials knew or should have known that sexual harassment was taking place and did nothing to prevent its continuance. Metropolitan filed a motion for summary judgment, which the trial court denied, opining that teacher-on-student sexual harassment under Title IX was to be measured pursuant to a negligence standard, and that the "facts could support the conclusion that the School Defendants should have known about the sexual harassment and taken prompt action to stop it." This Court reversed, and in so doing, reasoned that insofar as "Title IX was passed pursuant to Congress' Spending

Clause power," monetary recovery was limited to remedying acts of "intentional discrimination."[3] *Id.* at 1028; see also *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 599, 103 S.Ct. 3221, 3231 77 L.Ed.2d 866 (1983). Such intent, we concluded, is present only where the defendant-school has "actual knowledge" of sexual harassment and fails to take appropriate action to end it. *Smith*, 128 F.3d at 1034. Because Metropolitan never possessed actual knowledge of Rager's and Smith's sexual liaison while it was taking place, there was no need for us to consider what constituted "appropriate action."

In my view, Smith's "actual knowledge" requirement is the very basis of Title IX liability, and it transcends any differences that might exist between the nature of teacher-on-student and student-on-student sexual harassment. Both demand that the plaintiff establish intentional discrimination before Title IX liability will attach, and school officials cannot intend to discriminate against an individual unless they have actual knowledge of harassment in the first place.[4] See *id.* at 1034 (explaining that "[w]here a grant recipient has no knowledge of alleged discrimination, it cannot be said to have intentionally discriminated against the plaintiff"). I join in that part of

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[3] Although we conclude today that Title IX was enacted pursuant to its Spending Clause powers as well as Section 5 of the Fourteenth Amendment, the fact remains that the statute prohibits *intentional* discrimination only.

[4] Because it is *the* threshold inquiry under Title IX, and is implicit in the discussion throughout the remainder of this opinion, I see no need to repeatedly reference the requirement that an educational institution must possess *actual knowledge* of alleged sexual harassment before Title IX liability might attach.

the majority holding that recognizes this very significant "actual knowledge" prerequisite to Title IX liability, and make special note that it is clearly reflected in the majority's standard, which reads, in part: "[A] Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment . . . , provided the recipient's responsible officials actually knew that the harassment was taking place." Maj. Op. at 661 (emphasis added). But while I agree with the general spirit of Title IX liability as set forth in the majority's "actual knowledge" test, I nevertheless have serious misgivings about other facets of the standard it proposes.

Although this Court has issued but one decision dealing with and defining the parameters of Title IX liability, that single case, *Smith*, leaves no doubt that Title IX forbids intentional discrimination only. I fear that a casual reader of today's majority opinion might very well argue that negligence concepts have somehow crept into our Title IX jurisprudence. It may indeed be true that "Doe has alleged facts that would allow a jury to find that the University failed to respond promptly and appropriately to her complaints" Maj. Op. at 668, but such a statement begs the question as to what constitutes a "prompt and appropriate" response – is it merely some action, however trite, suspension (as was done here), or expulsion of the harassing student? Of course, the answer thereto must lie somewhere beyond a negligence rubric, and hinges on the circumstances of the particular case. The issue is not whether a given school did enough to wipe out ongoing student-on-student sexual harassment

– that is a negligence inquiry[5] – rather, the proper question is whether the responsive action taken was of such a nature that it effectively evinced the school's intent to perpetuate a sexually-hostile environment.[6] In other words, if a school district acquired actual knowledge of peer-on-peer harassment and undertook measures that it believed would achieve their desired result, but which fell short in doing so, one could hardly suggest that school officials intentionally discriminated against the complaining student unless their response was so de

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[5] I am well aware, however, that an educational institution's pattern of "negligent" responses to complaints of peer-on-peer sexual harassment (i.e., responses that fail to evidence an endorsement of harassment) might under certain circumstances conceivably rise to the level of intentional discrimination. *See e.g., Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir.), *cert. denied*, 468 U.S. 1217, 104 S.Ct. 3587 (1983) (recognizing that a pattern of negligent responses can evidence "deliberate indifference").

[6] The majority hints that a school's response to complaints of harassment will only constitute "intentional discrimination" if it demonstrates an intent to foster a sexually hostile environment by stating that:

> the combination of knowledge that sexual harassment is occurring in places or activities under the school's control and intentional failure to take prompt, appropriate action (such as investigation and, if warranted, disciplinary measures) is presumably, perhaps even necessarily, a manifestation of intentional sex discrimination. After all, what other good reason could there possibly be for refusing even to make meaningful investigation of such complaints. . . .

Maj. Op. at 663 (citation omitted).

minimis that it evidenced an endorsement of the harassment, they somehow treated female complaints differently than male complaints, or vice versa,[7] or they departed from established policies and practices when punishing student harassers.[8] This appears to be what the majority is attempting to get at when it states:

> As long as the responsive strategy chosen is one plausibly directed toward putting an end to the

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[7] Because I am of the opinion that intentional discriminatiuon is manifested in a school's disparate treatment of female and male sexual harassment complaints, I agree with the Fifth Circuit's *Rowinski* decision to the extent that it concluded "a school district might violate title [sic] IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." *Rowinski*, 80 F.3d at 1016. I disagree, however, with *Rowinski's* suggestion that this is the only way in which a plaintiff can demonstrate intentional discriminatiion under Title IX. The majority fails to make clear whether it objects to *Rowinski* in toto, including the "disparate treatment" concept, or if it, like myself, criticizes that case for simply being too limited in scope.

[8] "It is well settled law that departures from established practices may evince discriminatory intent." *Nobozny v. Podlesny*, 92 F.3d 446, 455 (7th Cir.1996) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S.Ct. 555, 564-65 (1977)). And Title IX regulations presently require schools to adopt and publish grievance procedures for prompt and equitable resolution of sexual discrimination and/or harassment complaints, and to disseminate policies prohibiting such conduct. *See* 34 C.F.R. § 106.8. Thus, it in all probability would not be difficult for a trier of fact to determine whether school officials had "departed from established practices," and, resultingly, intentionally discriminated against a particular plaintiff, in violation of Title IX.

> known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit.

Maj. Op. at 667-68. I think a "meaningful" response, as Judge Cummings uses the term, can and should be interpreted very broadly to include any remedial action which is not so de minimis that it demonstrates an intent by school officials to discriminate against the complaining student on an improper basis. I would, therefore, prefer to raise the level of deference we should accord schools' remedial actions even beyond Judge Evans' observation that "[c]onsiderable deference . . . must be given to schools in meeting these demands, and a wide range of reasonable responses should be permitted" Evans Op. at 50 (emphasis added), and emphasize the word "considerable." Alternatively, if a school fails to take prompt remedial steps after having received actual notice of student-on-student harassment taking place during a school-sponsored and supervised activity, acquiescence could in such an instance be perceived as amounting to intentional discrimination.

The bases of liability I propose above, like many other aspects of this fast developing area of the law, may be new to Title IX, but that is not to say they are entirely foreign to our jurisprudence. Only one year ago, in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir.1996), we considered a student's claim of peer-on-peer harassment under 42 U.S.C. § 1983, as opposed to Title IX. And while § 1983

and Title IX do differ as to from whom relief might be obtained,[9] they are, in fact, quite similar with respect to how a court, proceeding without statutory or Supreme Court guidance, should go about construing claims brought pursuant to them, for "[b]oth statutes prohibit the same kind of conduct and provide compensatory and punitive damages as remedies. . . . " *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir.1996) (emphasis added). Indeed, both Title IX and § 1983 forbid intentional sexual discrimination. That having been said, I believe it would be helpful to summarize the facts of *Nabozny*, which, in my opinion, arguably would have stated a cognizable claim under Title IX.[10]

Jamie Nabozny attended middle and high school in the Ashland Public School District in Ashland, Wisconsin. *Nabozny*, 92 F.3d at 449. From around the time he entered the seventh grade until he withdrew from Ashland High School in his junior year, Nabozny suffered not only continual harassment, but also physical abuse at the hands of his peers due to the fact that he was an avowed homosexual; his male classmates regularly referred to

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[9] Whereas a Title IX claim can only be brought against a grant recipient and not an individual, *Smith*, 128 F.3d at 1018-19, an action brought pursuant to § 1983 may lie against individuals.

[10] Of course, this Circuit now recognizes that "a plaintiff may not claim that an instance of intentional discrimination simultaneously creates causes of action under Title IX and under § 1983 and the Equal Protection Clause of the Fourteenth Amendment; the availability of a Title IX claim precludes the pursuit of a § 1983 claim." *Merrill Area Pub. Sch.*, 91 F.3d at 862 (citing *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168 (3rd Cir.1993), *cert. denied*, 510 U.S. 1043, 114 S.Ct. 689 (1994)).

him as "faggot," struck and spit on him, performed a mock rape on him in a science classroom, as well as pushed him, forcing him to fall into a urinal. *Id.* at 451-52. After each of these incidents, Nabozny's parents met with Ashland High's Principal, Mary Podlesny, to report what had happened and identify the perpetrators. *Id.* at 451. And on each occasion, no action was forthcoming on the part of the school authorities; in fact, Podlesny's alleged responses ranged from stating, "boys will be boys," to telling Nabozny that "if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students." *Id.* Nabozny eventually filed suit pursuant to § 1983 against Podlesny, among other parties, including the Ashland School District, alleging that the defendants violated his Fourteenth Amendment rights to equal protection and due process.

On appeal from the district court's entry of summary judgment in the defendants' favor, this Court reversed. In so doing, we explained that "[i]n order to establish liability under § 1983 [for an equal protection violation], Nabozny must show that the defendants acted with a nefarious discriminatory purpose," *Id.* at 453 (citation omitted), that is, "demonstrate intentional or purposeful discrimination." *Id.* at 454 (quoting *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir.1982) (emphasis added)). And "[d]iscriminatory purpose," we stated, "implies that a decisionmaker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group." *Id.* at 454 (quoting *Shango*, 681 F.2d at 1104). Applying these § 1983 principles to the facts in Nabozn[illegible] we explained:

> Nabozny has presented evidence that his classmates harassed and battered him for years and that school administrators failed to enforce their antiharassment policies, despite his repeated pleas for them to do so. If the defendants otherwise enforced their anti-harassment policies, as they contend, then Nabozny's evidence strongly suggests that they made an exception to their normal practice in Nabozny's case.
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> Therefore, the question becomes whether Nabozny can show that he received different treatment because of his gender. . . . Nabozny does allege . . . that when he was subjected to a mock rape Podlesny responded by saying "boys will be boys," apparently dismissing the incident because both the perpetrators and the victims were males. We find it impossible to believe that a female lodging a similar complaint would have received the same response.
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> Moreover, Nabozny introduced evidence to suggest that the defendants literally laughed at Nabozny's pleas for help.

Id. at 454-55. Nabozny's message is unequivocal, and should not be lost in any attempt to differentiate between § 1983 and Title IX. Specifically, intentional discrimination can be manifested in an institution's: (1) complete failure to respond to allegations of peer-on-peer harassment; (2) its disparate treatment of male and female complaints thereof; and/or (3) its unexcused departure from established anti-harassment policies. Nabozny did not call upon this Court to address the fourth way in which a school's intent to discriminate might be demonstrated; namely, by taking remedial action which is so de minimis

in nature that it might very well be considered an endorsement of sexual harassment.

In this case, Doe does not allege that University High School officials did nothing in response to her accusations of sexual harassment, nor that they previously had, much less would have, reacted differently to a male student's complaints thereof. Rather, the school suspended two of Doe's harassers for ten days each, and transferred another one of them out of Doe's biology class. Does such a response, which turned out to be unsuccessful in curtailing the boys' campaign of sexual harassment, circumstantially evidence the school's intent to discriminate against Doe? I think not, but that is an issue for the district court on a motion for summary judgment, or for the trier of fact at trial.

That having been said, I turn to another troubling aspect of the majority's standard; namely, that the majority, in imposing Title IX liability for peer-on-peer harassment which "takes place while the students are involved in school activities or otherwise under the supervision of school employees" Maj. Op. at 661, advances an ir definite disjunctive test that casts far too broad a net upon the acts of students for which an institution might incur liability. In my view, only harassment that takes place while students are involved in school-sponsored activities, whether on or off school grounds (i.e., during scheduled classes, school-sanctioned athletic events, dances, field trips, or theatrical productions, to name a few), might conceivably provide cause for Title IX liability. Unlike the majority's standard, my test maintains Title IX's requisite relationship between the discrimination alleged and the school sought to be charged. For

example, let us suppose that students within a public institution called "City Public High School" hold an annual dance entitled the "City Public High School Winter Formal." Notwithstanding the name of the event, it is not school-sanctioned, but is instead an entirely private gala that takes place at a suburban country club and is open to only a select group of invited students. The district neither provides funding for the affair nor assists in the organization, planning or supervision of it – every arrangement is exclusively made by and through the students. Once at the dance, a male student makes some unwanted sexual "passes" at a female classmate in attendance who, in turn, complains to her principal about it several days later. The school takes corrective action, but the same type of "harassment" occurs at next year's "Winter Formal." This time the young woman visits with her attorney, rather than the principal, and brings a Title IX action against the school district. While the majority's use of the loose term, "school activities," could possibly encompass this set of facts, I do not think that Title IX was enacted to capture a broad range of conduct of this nature. In my view, there must be established a true and meaningful nexus between the harassment alleged and the institution sought to be charged under Title IX. Where, as in the preceding hypothetical, a number of students attend an event which they have planned, financed and supervised without the assistance of school officials, I submit that the "connection" between the harassing conduct and the school district is far too tenuous to justify the imposition of Title IX liability. Simply put, the majority's use of the malleable term, "school activities," is too indefinite and all-inclusive, and could

very well invite Title IX liability well beyond the parameters Congress envisioned, thus potentially expanding the number of situations in which student-on-student harassment is actionable. For this reason, I am of the belief that Title IX liability must be limited to harassment which takes place while students are involved in school-sponsored activities, as opposed to any function in which students participate, be it their own or that of another organization.

In the same vein, I disagree with the majority that Title IX liability alternatively arises for "harassment that takes place while the students are . . . otherwise under the supervision of school employees." Maj. Op. at 661. Once again, this language is too all-inclusive. Taken literally, the majority's standard could potentially impose Title IX liability if, after school hours or even during summer break, a male student visits the home of a female peer whose father happens to be a public school employee (i.e., a custodian or maintenance man), and sexually harasses her (assuming that the parent (school employee) was present to supervise the students' behavior).[11] The parent's "supervision" of his daughter and the harassing student is in such a case completely unrelated to his position as a school employee, and the harassment itself poses no relationship whatsoever to an educational "program or activity." The emphasis I am placing on the harassing conduct (i.e., under what circumstances it takes place) is not inconsistent with the notion that Title IX

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[11] This example further assumes, of course, that school officials possessed actual knowledge that the harasser had previously engaged in harassing conduct.

does not impute liability on educational institutions for the acts of students, but rather for the institutions' failure to respond promptly and appropriately to complaints of sexual harassment properly brought to their attention. If one student sexually harasses another and the harassee complains to school officials, the school will only be liable if: (1) it had actual knowledge of the harassment; (2) it fails to undertake prompt and appropriate remedial action; and (3) the harassment continues. Therefore, assuming that a school actually knew about student-on-student harassment and did not take prompt and appropriate remedial measures in response thereto, the true linchpin of Title IX liability is the actual act of continued harassment.

My belief that the majority has in this instance gone too far with its sweeping test is not only grounded in the strict language of Title IX, but also in my appreciation of the veritably impossible task imposed on school authorities of controlling the all-too-frequent reckless and unpredictable behavior of today's adolescents. The law does not allow minor children (under eighteen years of age) to consent to surgical procedures without parental approval because of their emotional immaturity.[12] For this very reason, they are likewise prohibited from voting, going to war, purchasing alcohol or cigarettes, and

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[12] Because courts typically refer to individuals below the age of eighteen as "minors," *see, e.g., Behnke v. Behnke*, 103 Wis.2d 449, 309 N.W.2d 21 (Ct.App. 1981), whereas developmental psychologists sometimes allude to them under the label, "adolescents," I shall use the two terms interchangeably when referring to children under eighteen years of age.

even contracting.[13] Is it not ironic then that these same minors have the ability to cast their school systems into dire financial straits due to sexual harassment driven by the same unalterable juvenile shortcoming? Much ink has been spilled in the name of explaining exactly why young adolescents are, or should be, denied certain legal rights and privileges traditionally accorded to adults. In *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), for example, the Supreme Court articulated its rationale for refusing to equate the constitutional rights of children with those of adults, stating:

> [T]he Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.

Id. at 635, 99 S.Ct. at 3044 (emphasis added). Indeed, most minors simply have not gained sufficient knowledge and experience in the affairs of life to exercise sound discretion and judgment. Behavioral scientists have likewise contributed to the cause of understanding what

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[13] A minor may, of course, enter into a contract with another, but "it is settled law . . . that a contract of a minor for items which are not necessaries is void or voidable at the minor's option." *Halbman v. Lemke*, 99 Wis.2d 241, 245, 298 N.W.2d 562, 564 (1980) (citations omitted).

underlies society's belief that adolescents are poor decision-makers, and concluded that it may very well be attributable to minors' regular participation in dangerous activities, despite their appreciation of the risks involved. See Elizabeth Cauffman & Laurence Steinberg, The Cognitive and Affective Influences on Adolescent Decision-Making, 68 TEMP. L.REV. 1763, 1767, 1772 (1995). This stems, in large part, from "the adolescent['s] . . . view [of] himself or herself as unique and, moreover, invulnerable to harm." *Id.* at 1767 (emphasis added) (citing Daniel K. Lapsley & Michael N. Murphy, Another Look at the Theoretical Assumptions of Adolescent Egocentrism, 5 DEVELOPMENTAL REV. 201, 214-15 (1985)). It follows, then, that when a minor student sexually harasses his peer, he does not do so for want of knowledge that such behavior is wrong or socially unacceptable, but rather because of his cavalier attitude towards risk and a false inner sense of invincibility. School administrators have been, and shall continue to be, unable to alter this innate risk-loving nature of teenagers, and there is little reason why they should be burdened with this assignment when it comes to student-on-student sexual harassment.

The policies which underlie our law's prohibition against the participation of minors in those activities set forth above (i.e., voting, etc.) also argue against imposing Title IX liability for peer-on-peer harassment. I harken back to what the Supreme Court said in *Bellotti* – "that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti*, 443 U.S. at 635, 99 S.Ct. at 3044. That is, the law wisely limits the decision-making ability

of minors when the exercise of their own poor judgment creates costs which fall primarily on themselves. Our modern society is a litigious one, and although the cost of peer-on-peer harassment under Title IX will be borne by the school systems (vis-a-vis "deep-pocketed" taxpayers), it is the students who will ultimately suffer through reduced funding in their education pursuits – this is precisely the type of situation in which the law should protect minors from their own foolish judgments. The fact of the matter is that Congress has enacted title IX, and we have interpreted the statute to mandate that courts, in certain circumstances, not equate peer-on-peer sexual harassment with consenting to surgical procedures and the like. There is no reason to infer, however, from existing case law or legislative history that we must construe Title IX's text as broadly as possible, much as the majority has attempted herein. As I noted in *Smith*, being a reviewing federal appellate court, in contradistinction to a lawmaking body, "we resolve[ ] . . . ambiguit[ies] not by invoking some policy that supersedes the text of the statute,' but rather by limiting ourselves to that meaning which a given text will reasonably bear." *Smith*, 128 F.3d at 1041 (Coffey, J., concurring).

Finally, I wish to point out that, contrary to what one might be led to believe by the majority opinion's heavy reliance on Title VII (*see* Maj. Op. at 665-67), this Court is not retreating from its position in *Smith* that Title IX and Title VII are not analogous statutes, and as such, the latter should not be used to enlighten our analysis under the former except in very limited circumstances. In *Smith*, we explained in unequivocal language that "it is helpful to look to Title VII to determine whether the alleged sexual

harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX," *Smith*, 128 F.3d at 1023, but went on and clearly stated that there existed no " 'justifi[cation for] the importation of other aspects of Title VII law into the Title IX context.' " *Id.* (quoting *Rosa H.*, 106 F.3d at 653). Thus, in light of *Smith*, which is the law of this Circuit, it is plainly improper for the majority to suggest that "[t]here is no reason why students such as Jane Doe should be afforded a lesser degree of protection against . . . 'hostile environment' discrimination than adult workers in the employment setting regulated by Title VII." Maj. Op. at 665. Intentional discrimination under Title IX is measured vis-a-vis an "actual knowledge" standard, whereas "the standard for employer liability [under Title VII] in cases of hostile-environment sexual harassment by a supervisory employee is negligence [(i.e., "knew or should have known")]." *Jansen v. Packaging Corp. of America and Ellerth v. Burlington Indus. Inc.*, 123 F.3d 490, 495 (7th Cir.1997) (en banc) (per curiam), *cert. granted in part by Burlington Indus., Inc. v. Ellerth*, ___ U.S. ___, 118 S.Ct. 876, 139 L.Ed.2d 865 (Jan. 23, 1998). These are two very separate and distinct tests which afford different degrees of protection to those individuals who bring claims pursuant to Title IX and Title VII. It follows then that Doe should not, as the majority now proposes, be entitled to the same degree of protection under Title IX as adult workers are in the employment setting under Title VII.

Because I am confident that *Doe* will not be the last student-on-student sexual harassment case to come before this Court, I close with the concern that the majority opinion, which I join only in part, has attempted to

open the gates to Title IX liability wider than that statute's language reasonably allows, and it shall only be a matter of time before the floodwaters of litigation begin to rise. Allegations of peer-on-peer harassment are being levied at a fevered pitch even in the primary grades, and oftentimes for conduct that is nothing more than "child's play." Indeed, only one year ago a six-year-old, North Carolina first-grader was accused of sexual harassment after he kissed a female classmate. *See* Linda Chavez, *Feminist Kiss Patrol is on the March*, USA TODAY, Oct. 2, 1996, at 15A. More recently, school officials in Pittsburgh suspended a ten-year-old, fourth-grade student for two days because he, and his two "victims" put it, grabbed one of them from behind and subjected the other to an unwanted hug. *Kid Stuff a Silly Sexual Harassment Charge Against a 10-Year-Old*, PITTSBURGH POST GAZETTE, Sept. 25, 1997, at A22. My point is simply that, absent Congressional or Supreme Court guidance in this area of the law, we must be mindful to approach it with an application of common-sense, combined with utmost reflection and study, so as not to let it get "out of control" for those individuals who must live by its mandate.

In *Jansen*, 123 F.3d at 543 (Coffey, J., concurring in part and dissenting in part), I noted that "[j]ust as the ill-advised expansion of the law in the [medical malpractice and products liability] areas has worked to the detriment of the average American citizen, so too will the expansion of employer liability in the Title VII context." The same goes for Title IX, but it will not just be the "average American citizen" who suffers in the form of higher taxes, for children in public schools are the ultimate recipients of federal educational funding – they are also

the one [sic] who lose when those monies are withheld. The cost of making school authorities guardians of acceptable social behavior outside of school-*sponsored* activities could be devastating, for Title IX, unlike Title VII, does not include a statutory ceiling on recoverable monetary damages. *See* 42 U.S.C. § 1981a(b)(3). In fact, merely defending against a multi-million dollar Title IX lawsuit can mean the difference between hiring five new teachers and discharging five existing ones, purchasing upgraded computers and making do with outdated machines, or expanding the library's collection and dropping a remedial reading program. I find it troubling that an emotionally-immature minor student has the ability to make this difference, thereby depriving his innocent peers of valuable learing opportunities. A very recent study by the International Association for the Evaluation of Educational Achievement revealed that our Nation's eighth-graders currently rank only twenty-eighth out of forty-one developed countries around the world in mathematics, and only seventeenth in science. *See* Peter Applebome, *U.S. Students Just Average in Math, Science Rankings at a Glance*, N.Y. TIMES, Nov. 21, 1996, at N1. A "National Report Card" on the condition of public education in the fifty states, released on January 8, 1998, likewise relates some discouraging news – America's schools are not "making the grade." *See Quality Counts '98*, EDUC. WK., Jan. 8, 1998. Overall, the states received a "C+" grade for the amount of resoureces they allocated to education.[14] *Id.* at 3. How can this be when most states

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[14] The "report card" also issued the following overall state grades for the three respective categories: "Standards and

are devoting more funds to education today than they did ten years ago? *Id.* The answer is simple: "two few of the additional dollars have reached classrooms." *Id.* (emphasis added). The easier it is to reach into our schools' coffers under Title IX, the faster these statistics shall plummet, and, in turn, the sooner we will have to bear the burden of a tragically undereducated society.

I do recognize that student-on-student harassment is a most serious issue, and echo the sentiments I expressed in my *Smith* concurrence, that "I am unalterably opposed to sexual harassment, which is both intolerable and wrong." *Smith*, 128 F.3d at 1041 (Coffey, J., concurring). And although perhaps the most appropriate forum to educate children on the iniquitousness of harassment, whether sexual or otherwise, is in the home, the fact of the matter is that Congress, by enacting Title IX, has placed the responsibility on educators to insure that it not be tolerated, and does not persist, in our schools. It is my belief that the "actual knowledge" standard, coupled with the ideas articulated herein, accurately captures the "intentional discrimination" which Title IX seeks to prohibit.

EVANS, Circuit Judge, concurring.

I am pleased to join Judge Cummings' splendid opinion. I write separately only to offer a few observations as this case returns to the district court for further proceedings. Our bottom line is, as Judge Cummings writes, "that a Title IX fund recipient may be held liable for its failure

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Assessment" – (B); "Quality of Teaching" – (C); "School Climate" – (C-).

to take prompt, appropriate action in response to student-on-student sexual harassment that takes place on the recipient's grounds or while its students are involved in school activities, provided the recipient's responsible officials actually knew that the harassment was taking place." (Slip. op. at 661.) I support this holding and have nothing to add to Judge Cummings' effective analysis of why the Fifth and Eleventh Circuits' contrary view is flawed. But the devil here will be in the details.

It is vitally important to emphasize that this case is on appeal following a dismissal for failure to state a claim under Rule 12(b)(6). As such, we are required to assume all facts in the complaint to be true, but of course we cannot and do not vouch for their accuracy. The complaint in this case is a sprawling document – 21 pages peppered with 114 separately numbered paragraphs. Seventy-one of the paragraphs are under the heading "Facts." Although the complaint is excessively long and unnecessarily detailed, its gist is that our plaintiff, while a student a [sic] University High, faced an unrelenting campaign of verbal and physical sexual harassment perpetrated by a group of male students at the school and that the school officials did little or nothing to address the chaotic situation. What troubles me, and what will have to be addressed by the district court upon remand, is just what exactly did the school do here to address the situation and was what it did enough? The complaint, and the concession at oral argument that Judge Cummings notes (slip op. at 668), give a hint that the school did something to ameliorate the situation – it suspended two boys. Tested later on summary judgment, that just might turn out to be enough to satisfy our command that

a school must take "prompt and appropriate" action to combat know [sic] sexual harassment.

Schools do not have to eliminate sexual harassment by students upon other students. That would be an impossible task, for schools are full of all sorts of kids, and every school has its share of buffoons, yokels, and dunderheads of all stripes. And unlike harassers in the work place, students can't be fired. Schools are also full of kids with raging hormones who may be crude and insensitive when dealing with students of the opposite sex. So although I agree that Title IX requires schools receiving federal funds to be engaged in combating student-on-student sexual harassment, what I think is required is that a school not turn a blind eye to a sexually hostile environment. Considerable deference, I believe, must be given to schools in meeting these demands, and a wide range of reasonable responses should be permitted.

Statement of EASTERBROOK, Circuit Judge, respecting the denial of rehearing en banc.

The panel circulated its opinion before release under Circuit Rule 40(e) so that we could decide whether to create a conflict among the circuits on the question whether the eleventh amendment to the Constitution, as understood in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), prevents Congress from providing that suits under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, may be heard in federal court. Our panel holds that Title IX is based in part on the fourteenth amendment, so that the principle of *Fitzpatrick v. Bitzer*, 427 U.S. 445 96 S.Ct. 2666, 49

L.Ed.2d 614 (1976), applies. Sex discrimination by public schools is a subject within the legislative power under § 5 of the fourteenth amendment, and Congress need not catalog the grants of power under which it legislates; courts do not remand statutes for better statements of reasons. None of the active judges questions the panel's decision on this issue.

After the panel circulated its draft opinion, some judges expressed concern about a different question: under what circumstances does inaction by a public school that has received reports of one pupil's misconduct toward another amount to sex discrimination? Taking sides in a second conflict among the circuits, the panel held that failure to protect pupils from private aggression is a species of discrimination. This is the original meaning of equal protection of the laws. If a state protects white or male residents against crimes (or torts), it must protect the black or female residents as well. Some courts of appeals seem to have forgotten this, but the panel has not – and again none of the active judges favors review of this question by the full court. What has led to the dissent from the majority's decision to let the panel issue its opinion is not a belief that we should follow one of the other circuits but concern about how to implement the principle that schools must protect their female pupils against private assaults. What level of knowledge is required? How effective must intervention be? These are difficult questions, on which Title IX offers no guidance – and on which none of the other circuits has yet offered a view.

One would suppose from 20 U.S.C. § 1682 that issues posed but not answered by Title IX are to be resolved by

the federal aid-granting agencies, after their regulations have been reviewed by the President, with judicial review to follow under 20 U.S.C. § 1683. Use of a private right of action for damages to short-circuit this deliberately cumbersome process not only replaces administrative negotiation with damages liability (the source of the dissent's principal concern) but also leaves the court substantively at sea. Is it wise to jump the gun in this fashion? Why not say that, until regulations have specified vital details, damages are inappropriate? Cf. *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). Although *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992), holds that there is an implied private right of action for damages to enforce Title IX (an action directly under Title IX, not via 42 U.S.C. § 1983 and *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980)), it does not command the inferior courts to award damages in problematic cases before school districts know what is expected of them. *Franklin* and its precursor *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), are about remedies: they add private damages to the statutory approach of terminating federal funding. *Cannon* infers the remedy from the right; it does not dispense with the need to *find* a right clear enough to be enforceable. Rulemaking under § 1682, rather than adjudication, should be the source of gap-filling rules. Otherwise the remedy breeds its own right. Notice-and-comment rulemaking with approval of the President, not events-and-damages "rulemaking" in common law fashion, is the method specified in § 1682. The absence of rules

defining with precision the schools' obligations counsels hesitation, even if it does not foreclose damages.

As a standard that school districts must satisfy until regulations have been issued – alternatively, that pupils must meet if they want *damages* as opposed to administrative relief – Chief Judge Posner's proposal makes a great deal of sense. But I do not think it necessary or appropriate to hear this case en banc, for we do not know whether the choice of standard matters. Anything we say on the subject may be advisory – and unnecessary too, for none of the three judges on the panel clearly rejects an analogy to the deliberate-indifference standard under *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Our last effort to resolve an issue of this kind in the abstract did not fare well. See *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir.1997) (en banc), cert. granted under the name *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S.Ct. 876, 139 L.Ed.2d 865 (1998). After we have learned how (if at all) the differences among standards matter, and the parties have had an opportunity to brief the subject with a recognition of its significance, we will be able [sic] address the question, if that still appears to be necessary. It would be premature to hear this issue en banc now.

POSNER, Chief Judge, with whom FLAUM and MANION, Circuit Judges, join, dissenting from denial of rehearing en banc.

The issue of a school's liability under 20 U.S.C. § 1681(a) (which forbids sex discrimination by schools

that receive federal financial aid) for the sexual harassment of one student by another is well worth the attention of the full court, quite apart from the issue of intercircuit conflict. The potentail liabilities of the nation's schools, already financially hard-pressed, are staggering, since insults, teasing, petty persecutions, grabbing, poking, sexual experimentation, and other forms of what might actually or arguably constitute sexual harassment are an omnipresent feature of school life. Liability for failing to prevent of [sic] rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measure [sic] would be to expose the school to a suit by the victim of the alleged harassment.

I tentatively favor the adoption of a standard of liability that would give schools substantial protection against being sued for failing to guess right about the proper management of sexual and related nastiness among their charges. That is the standard of "deliberate indifference," and I shall explain it in a moment. The clearest alternative, the negligence stardard, would not give the schools sufficient protection. The panel acknowledges this; none of its members endorses the negligence standard. Judge Cummings' opinion adopts a hybrid standard: the school must have actual knowledge of the harassment; but if it does, then it is liable (as I read the opinion) if it fails to respond with "prompt and appropriate action." This could mean, if it acts negligently. This would still not be the negligence standard, because that standard does not require knowledge of the risk; that is

why I call Judge Cummings' standard a hybrid. Some language in his opinion, however, suggests a higher standard than simple negligence to govern the school's response to knowledge of a risk ("courts should not second-guess the professional judgments of school officials"), as does the language of Judge Evans' concurrence. Judge Coffey would limit liability to instances in which the school's misconduct can fairly be described as intentional, an approach very similar to deliberate indifference. It is unclear how much real "space" there is between the position of Judges Cummings and Evans on the one hand and Judge Coffey on the other; it is not even clear that Judges Cummings and Evans see completely eye to eye; nor is it what I have described as the hybrid standard sufficiently clear, precise, or familiar to provide sure guidance to school officials and their lawyers.

We need to consider the important issue of the proper standard as a court. The hybrid standard is a possibility but would have to be more clearly defined to be serviceable. Simple negligence is another possibility, gross negligence a third. The statute does not say. We must choose. My tentative preference is for the standard of deliberate indifference. Title IX in general and section 1681(a) in particular are not designed to create a comprehensive and stringent new regime for the regulation of sexual harassment in schools but to create sex equality in educational programs and facilities. The analogy to Title VII is deceptive, since Title VII regulates the behavior of adults in the workplace rather than the inevitably unruly behavior of adolescents. It may be excessive intrusion into the management of the schools for the courts to sanction them for failing to prevent the harassment of one

student by another unless the school's failure can fairly be described as intentional.

Three types of intentional failure can be distinguished. The first, which must be very rare, is where the school wants the harassment to occur. The second is where the school deliberately treats harassment differently depending on the sex, race, etc. of the pupils involved. There too, liability is clear. The third and most difficult case is where the school knows about the harassment, knows that it is serious or even dangerous, and could take effective measures at low cost to avert the danger, but decides – consciously, deliberately – to do nothing, although it does not base this decision on an invidious ground such as race or sex. The school doesn't mean any harm to the victim of the harassment, but knowing that the harassment is occurring, is serious, etc., it decides to do nothing. An example mentioned in Judge Coffey's opinion is where the school deliberately departs, without adequate excuse, from its established policy in dealing with such incidents.

This difficult third case is the domain of "deliberate indifference," which is the equivalent of criminal recklessness. E.g., *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *West v. Waymire*, 114 F.3d 646, 651 (7th Cir.1997). Neither gross negligence, nor recklessness in the tort sense, is enough to satisfy this standard. E.g., *Billman v. Indiana Department of Corrections*, 56 F.3d 785, 788 (7th Cir.1995); *Sellers v. Henman*, 41 F.3d 1100 (7th Cir.1994). The standard of deliberate indifference has been invoked in a number of other school cases. *Kinman v. Omaha Public School District*, 94 F.3d 463, 467 (8th Cir.1996); *Doe v. Claiborne County*, 103 F.3d 495,

508 (6th Cir.1996); *Doe v. Taylor Independent School District*, 15 F.3d 443, 454 (5th Cir.1994). Two of these cases also impose a negligence standard for misconduct by the teacher; that is an issue currently before the Supreme Court.

Deliberate indifference by the school in a case of one student sexually harassing another would mean that the school (1) actually knew of (2) hostile or offensive conduct likely to interfere with the victim's education, and (3) deliberately did nothing, or took steps that it knew would be ineffectual, to protect the victim, (4) without excuse (for it might be difficult or even impossible to take effective measures). Element (1) and (4) will both be more difficult for the plaintiff to satisfy when the harassment occurs off the school premises; and that is how it should be because it is much more difficult for the school to discover and remedy off-premises harassment.

Through careful examination of alternative standards of liability, we can find the standard that will best fit the purposes and circumstances of Title IX and that will be simple and workable. That is a challenge well worth the court's plenary consideration.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JANE DOE, a minor, by JOHN DOE, Individually and as Father and Next Friend, and JANET DOE, Individually, and as Mother and Next Friend,	)	Case No. 96-1129
Plaintiffs,	)	
v.	)	
UNIVERSITY OF ILLINOIS, a public corporation, ALICE DEAN DAVIS-SMITH, Individually, JOEL CRAMES, Individually, HENRY MEARES, Individually, BARBARA L. WYSOCKI, Individually, WILLIAM R. SUTTON, Individually, THEODORE L. BROWN, Individually, SUSAN T. GONZO, Individually, and LARRY R. FAULKNER, Individually,	)	
Defendants.	)	

ORDER

(Filed Sep. 25, 1996)

Before this Court are Plaintiffs' Motion for Certification Pursuant to 28 U.S.C. § 1292(b) [#46], Defendants' Motion for Reconsideration and/or for Certification Pursuant to 28 U.S.C. § 1292(b) [#48]; Plaintiffs' Motion to Submit Additional Authority [#58]; Defendants' Motion to Add Additional Authority [#59]; and Plaintiffs' Motion for Reconsideration or For Leave to Submit Additional

Authority [#60]. For the reasons set forth herein, this Court GRANTS in part and DENIES in part Plaintiffs' Motion for Certification [#46]; DENIES Defendants' Motion for Reconsideration and/or for Certification [#48]; GRANTS Plaintiffs' Motion to Submit Additional Authority [#58]; GRANTS Defendants' Motion to Add Additional Authority [#59]; and GRANTS in part and DENIES in part Plaintiffs' Motion for Reconsideration or for Leave to Submit Additional Authority [#60]. This Court's jurisdiction arises under 28 U.S.C. § 1331.

Background

The allegations underlying the case at bar need not be set out in detail. Suffice it to say, Jane Doe, one of the Plaintiffs, was a high school student at University High School in Urbana, Illinois. The University of Illinois ("University") is responsible for overseeing the administration of the high school. While a student at University High School, Jane Doe was allegedly subjected to a campaign of verbal and physical sexual harassment by other students, including but not limited to ugly remarks, unwanted touching, and a sexual assault. John and Janet Doe are Jane's parents.

Counts I and II of the Complaint alleged violations of Title IX, 20 U.S.C. § 1681, *et seq.* (West 1988 and Supp. 1995), against the University and the individual Defendants. Title IX Provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program

> or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a). This Court earlier adopted Magistrate Judge David G. Bernthal's Report and Recommendation and dismissed the individual Defendants from the suit. *See Lipsett v. University of Puerto Rico,* 864 F.2d 881, 901 (1st Cir. 1988) (the Supreme Court had only recognized actions under Title IX against the educational institution itself); *Slaughter v. Waubonsee Comm. College,* 1994 WL 663596 at *2 (N.D.Ill. 1994) (an action, for individual liability cannot be brought under Title IX); *Bustos v. Illinois Institute of Cosmetology,* 1994 WL 710830 at *2 (N.D.Ill. 1994) (the implied right of action under Title IX only extends to institutional actors).

As to the University, this Court held that the University may be held liable under Title IX if Jane Doe could demonstrate that the University's failure to stop the campaign of sexual harassment resulted from its sexual discrimination against her. *See Bosley v. Kearney R-1 School Dist.,* 904 F.Supp. 1006 (W.D.Mo. 1995) (citations omitted) (protected persons have a private right of action under Title IX for intentional sexual discrimination); *Doe v. Petaluma City School Dist.,* 830 F.Supp. 1560, 1576 (N.D.Cal. 1993) (plaintiff must demonstrate discriminatory intent before a school district can be held liable for failure to stop peer sexual harassment). This Court dismissed Count I without prejudice and granted Jane Doe leave to replead.

This Court dismissed Count II with prejudice after finding that in a non-agency context, Title IX requires

intentional discrimination. *See Doe v. Petaluma, supra* at 1576.

Count III of the Complaint, arising under 42 U.S.C. § 1983, charged that each of the individual Defendants violated Jane Doe's civil rights. In adopting the Magistrate Judge's Recommendation, this Court held that a plaintiff afforded a specific federal statutory remedy may not bypass the requirements of the statute to proceed under § 1983. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 101 S.Ct. 2615, 2626 (1981). Section 1983 claims are subsumed by Title IX. *See Williams v. School Dist. of Bethlehem,* 998 F.2d 168, 176 (3d Cir. 1993), *cert. denied,* 114 S.Ct. 689 (1994). Count III was dismissed with prejudice.

Count IV alleged a violation of the Illinois Family Expense Act, 750 ILCS 65/15 (West 1993). This Court found the State statute to be derivative in nature, thus not providing a separate and independent cause of action. *Boesl v. Suburban Trust and Savings Bank,* 642 F.Supp. 1503, 1515 (N.D.Ill. 1986) (citations omitted). Plaintiffs withdrew the University as a Defendant to Count IV. After dismissing the individual Defendants, this Court held that there was no tort action to which the Family Expense Act could attach. Count IV was dismissed with prejudice.

Analysis

As an initial matter, both parties have filed motions for leave to submit additional authority. This Court has reviewed the materials submitted and finds them helpful to the resolution of the pending motions. Therefore, both

parties' motions for leave to sumbit [sic] additional authority are granted.

A. Motion to Reconsider

A motion to reconsider is only available to " 'correct manifest errors of law or fact or to present newly discovered evidence.' " *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (quoting *Keene Corp. v. International Fidelity Ins. Co.*, 561 F.Supp. 656, 665-66 (N.D.Ill. 1982)). Motions to reconsider are not to be used to "rehash" the arguments presented during the motion for summary judgment. *In re Oil Spill by "Amoco Cadiz"*, 794 F.Supp. 261, 267 (N.D.Ill. 1992).

Plaintiffs seek reconsideration of this Court's ruling that Title IX requires that a plaintiff plead intentional discrimination on behalf of the University. In the alternative, Plaintiffs seek leave to file additional supplemental authority. The Motion to Reconsider is denied because Plaintiffs have not demonstrated that this Court's ruling was a manifest error of law. At least two appellate courts have come to the same conclusion. *See Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006 (5th Cir. 1996); *Williams v. School Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993). However, this Court grants Plaintiffs leave to file the additional authority so that the record may be complete.

In support of their Motion to Reconsider, Defendants argue that this Court erred in holding that the Eleventh Amendment does not bar Count I of Plaintiffs' Complaint. Defendants cite *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), for the proposition that this Court lacks jurisdiction over Count I because Congress did not

expressly waive the sovereign immunity afforded by the Eleventh Amendment to the United States Constitution.

In *Seminole Tribe,* the Court examined a provision of the Indian Gaming Regulatory Act ("the Act"), 25 U.S.C. § 2710(d)(3). This section of the Act requires that States negotiate in good faith with Indian tribes. 25 U.S.C. § 2710(d)(3)(A). The Act authorizes an Indian tribe to sue a State for breaching the duty to negotiate in good faith. 25 U.S.C. § 2710(d)(7). The Court found that Congress did not have the authority to waive Eleventh Amendment Immunity under the Indian Commerce Clause. *Seminole Tribe,* 116 S.Ct. at 1132-33. The Court concluded that federal courts did not have jurisdiction to hear cases arising under the Act because the State had not consented to suit. *Id.* This analysis is not readily transferrable to Title IX claims because the Court limited its discussion to the narrow issue of Congress' authority to provide a judicial remedy in addition to the intricate remedial scheme set forth in 25 U.S.C. § 2710(d)(7).

Prior to the expansive view of sovereign immunity expressed in *Seminole Tribe,* the Supreme Court had recognized congressional authority to abrogate a state's sovereign immunity when legislation was enacted pursuant to either § 5 of the Fourteenth Amendment or the Interstate Commerce Clause, based on *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666 (1976), and *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S.Ct. 2273 (1989), respectively. *Seminole Tribe,* 116 S.Ct. at 1125. The Court then overruled its prior holding in *Union Gas,* stating that "both the result in *Union Gas* and the plurality's rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.*

The Court found that Congress could not overcome the jurisdictional bar of the Eleventh Amendment when legislating pursuant to the Interstate Commerce Clause because "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction" by Article III. *Id.* at 1132. However, the Court did not disturb its prior decisions with respect to legislation enacted pursuant to the Fourteenth Amendment, "which operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* at 1128. Thus, in the wake of *Seminole Tribe,* the only source of congressional authority capable of abrogating sovereign immunity under the Eleventh Amendment that has been recognized by the Supreme Court is legislation enacted pursuant to § 5 of the Fourteenth Amendment.

Title IX was enacted pursuant to Congress' power under the Spending Clause. *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 112 S.Ct. 1028, 1037 (1992). The power to enact legislation pursuant to the Spending Clause was not specifically addressed in *Seminole Tribe,* but would logically be included in the Supreme Court's finding that Congress cannot use Article I powers to circumvent Article III limitations on judicial power. 116 S.Ct. at 1132. However, the basic purpose of Title IX is to prevent discrimination based on sex, which indicates that Congress may also have acted in furtherance of the equal protection clause pursuant to § 5 of the Fourteenth Amendment. This issue was noted but not decided by the Supreme Court in *Franklin.* 112 S.Ct. at 1038, n.8.

In *Equal Employment Opportunity Commission v. Elrod,* the Seventh Circuit set forth a test for determining

whether legislation is enacted pursuant to § 5 of the Fourteenth Amendment as "whether the *objectives* of the legislation are within Congress' power under the amendment." 674 F.2d 601, 608 (7th Cir. 1982). Applying this test, it seems clear that Title IX was also enacted pursuant to the Fourteenth Amendment.

"Title IX was enacted to supplement the Civil Rights Act of 1964's bans on racial discrimination in the workplace and in universities." *Yusuf v. Vassar College*, 35 F.3d 709, 714 (2nd Cir. 1994). Similarly, the Supreme Court has held that Title IX confers an explicit benefit on persons discriminated against on the basis of sex because Congress sought to "avoid the use of federal resources to support discriminatory practices." *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 1956, 1961 (1979). Protecting citizens against "invidious discrimination of any sort, including that on the basis of sex," is a primary function of the federal government. *Id.* at 1963-64.

Prohibiting arbitrary or discriminatory government conduct is the "very essence" of the guarantee of equal protection under the Fourteenth Amendment. *Elrod*, 674 F.2d at 604. "Congress has § 5 fourteenth amendment power to prohibit sex discrimination." *Usery v. Allegheny County Institution Dist.*, 544 F.2d 148, 155 (3rd Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1582 (1977). Thus, since the objective of Title IX is to prevent discrimination based on sex in federally funded programs and preventing discrimination is central to Congress' power under the Fourteenth Amendment, this Court concludes that Title IX was also enacted pursuant to § 5 of the Fourteenth Amendment under the test in *Elrod*. Furthermore, the Civil Rights Remedies Equalization Act, 42 U.S.C.

§ 2000d-7, which expressly made states subject to suit in federal courts for failure to comply with Title IX, was clearly enacted pursuant to the Fourteenth Amendment. *See*, S. Conf. Rep., 132 Cong. Rec. 28624 (July 13, 1986) (reporting that the proposed amendment to the Civil Rights Remedies Equalization Act is grounded on congressional powers under section five of the fourteenth amendment.)

This Court therefore concludes that Congress enacted Title IX to prohibit recipients of federal funding from promoting discrimination based on sex in furtherance of § 5 of the Fourteenth Amendment, as well as the Spending Clause. Thus, sovereign immunity would not insulate Defendants from suit even under the most expansive reading of *Seminole Tribe*. Accordingly, Defendants have failed to demonstrate that the previous decision constitutes a manifest error of law and the Motion to Reconsider is denied. *Publishers Resource*, 762 F.2d at 561.

B. Motions for Certification

A motion will be allowed under § 1292(b) only where the district judge determines that an otherwise not appealable order "involves a controlling issue of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). A party may seek an order under § 1292(b) at any time. Fed.R.App.P. 5(a).

In support of their Motion for Certification, Plaintiffs argue that there is substantial ground for difference of opinion as to two issues: (1) whether Jane Doe has stated

a claim under Title IX against the University; and (2) whether Jane Doe has stated a claim under § 1983.

This Court's decision regarding whether Jane Doe adequately pled a violation of Title IX against the University comports with the law in the Fifth and Third Circuits. *See Rowinsky*, 80 F.3d 1006; *Williams*, 998 F.2d 168. However this Court's ruling conflicts with the Eleventh and Sixth Circuit's decisional law. *See Davis v. Monroe County Bd. of Education*, 74 F.3d 1186 (11th Cir. 1996), *petition for reh'g en banc granted*, 1996 WL 438188 (11th Cir. August 1, 1996); *Lillard v. Shelby County Bd. of Education*, 76 F.3d 716 (6th Cir. 1996). Therefore, this Court finds that there is substantial ground for difference of opinion as to this issue. Additionally, this issue involves a controlling issue of law and an immediate appeal from the order may materially advance the ultimate termination of this case. 28 U.S.C. § 1292(b). This Court grants Plaintiffs' Motion for Certification as to the Title IX issue.

Plaintiffs also contend that this Court should certify the issue of whether Title IX subsumes Jane Doe's § 1983 claim. This Court finds that there is not a substantial ground for difference of opinion regarding this point and denies the Motion for Certification on that issue.

Defendants also move for certification of an interlocutory appeal. Defendants' only ground for this issue is the same as their motion to reconsider: Whether the Eleventh Amendment bars suit against the University for violation of Title IX. In support of this claim, Defendants' rely on *Seminole Tribe* and *Rowinsky*. As noted above, this Court finds that the Supreme Court's holding in *Seminole Tribe, supra*, does not bar suit in federal court in the

present case. Furthermore, the decision in *Rowinsky, supra,* is consistent with the prior holding of the court that a protected person has a private cause of action under Title IX for damages resulting from intentional discrimination based on sex. Therefore, Defendants have failed to establish that the Eleventh Amendment issue satisfies the requirements of 28 U.S.C. § 1292(b), and their Motion for Certification is denied.

Conclusion

For the reasons set forth herein, this Court GRANTS in part and DENIES in part Plaintiffs' Motion for Certification [#46]; DENIES Defendants' Motion for Reconsideration and/or for Certification [#48]; GRANTS Plaintiffs' Motion to Submit Additional Authority [#58]; GRANTS Defendants' Motion to Add Additional Authority [#59]; and GRANTS in part and DENIES in part Plaintiffs' Motion for Reconsideration or for Leave to Submit Additional Authority [#60]. Plaintiffs may proceed on an interlocutory appeal on the issue of whether a cause of action lies under Title IX for the failure to inform a student if his or her rights under Title IX and failure to implement prompt and appropriate remedial action to stop peer to peer sexual harassment despite knowledge of the same.

IT IS SO ORDERED.

ENTERED this 25th day of September, 1996.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JANE DOE, a minor, by JOHN DOE, Individually and as Father and Next Friend, and JANET DOE, Individually, and as Mother and Next Friend,	)	Case No. 96-1129
Plaintiffs,	)	
v.	)	
UNIVERSITY OF ILLINOIS, a public corporation, ALICE DEAN DAVIS-SMITH, Individually, JOEL CRAMES, Individually, HENRY MEARES, Individually, BARBARA L. WYSOCKI, Individually, WILLIAM R. SUTTON, Individually, THEODORE L. BROWN, Individually, SUSAN T. GONZO, Individually, and LARRY R. FAULKNER, Individually,	)	
Defendants.	)	

ORDER

(Filed Mar. 29, 1996)

Before this Court is the Defendants' Motion to Dismiss [26]. For the reasons set forth herein, the Court DENIES the parties' objections, ADOPTS the Magistrate Judge's Report & Recommendation, and GRANTS in part and DENIES in part the Motion to Dismiss [26].

Plaintiffs originally filed their suit in the Northern District of Illinois. Subsequently, the Honorable Ruben Castillo transferred the matter to the Central District of Illinois-Urbana Division. The Honorable Harold A. Baker recused himself and transferred the case to the Peoria Division.

This matter was referred to the Magistrate Judge under Local Rule 1.4. On January 25, 1996, Magistrate Judge David G. Bernthal entered a Report & Recommendation granting in part and denying in part the Motion to Dismiss. Pursuant to 28 U.S.C. § 636(b)(1), the parties had ten (10) working days after service of the Recommendation, until February 15, 1996, to file objections to the Magistrate Judge's decision. Both parties filed timely Objections.

Factual Background

At the Motion to Dismiss, the Court takes as true all well-pled allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Magistrate Judge Bernthal thoroughly summarized the relevant facts, and this Court need not repeat the process. (Report & Recommendation, at 2-13.) Suffice it to say, Jane Doe, one of the Plaintiffs, was a high school student at University High School in Urbana, Illinois ("Uni High"). The University of Illinois is responsible for overseeing the administration of Uni High. While a student at Uni High, Jane Doe was subjected to a campaign of verbal and physical sexual harassment by other students, including but not limited to ugly remarks, unwanted touching, and a sexual assault. John and Janet Doe are Jane's parents.

Analysis

A. Motion to Dismiss

In resolving a motion to dismiss, this Court must consider all well-pled facts as true and must draw all inferences in favor of the non-moving party. *Bontkowski v. First Nat. Bank of Cicero*, 998 F.2d 459, 461 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 602 (1993). In ruling on a motion to dismiss, courts consider whether relief is possible under any set of facts that could be established consistent with the allegations in the Complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This Court will dismiss a claim only if it is beyond doubt that no set of facts would entitle the Plaintiffs to relief. *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 432 (7th Cir. 1993).

The individual Defendants moved to dismiss Counts I and II of the Complaint, arguing that Title IX, 20 U.S.C. § 1681, *et seq.* (West 1988 and Supp. 1995), does not apply to individuals. This Court agrees. Title IX provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a).

In *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988), the court noted that the Supreme Court had only recognized actions under Title IX against the educational institution itself. The court ruled that any

action against the individuals employed by the educational institution must be brought under § 1983. *Lipsett*, 864 F.2d at 901; *accord, Siaughter v. Waubonsee Comm. College*, 1994 WL 663596 at *2 (N.D.Ill. 1994) (an action for individual liability cannot be brought under Title IX); *Bustos v. Illinois Institute of Cosmetology*, 1994 WL 710830 at *2 (N.D.Ill. 1994) (the implied right of action under Title IX only extends to institutional actors). Therefore, the individual Defendants are dismissed from Counts I and II with prejudice.

The University also moved to dismiss Counts I and II. The Magistrate Judge recommended, and this Court agrees, that the University may be held liable under Title IX if Jane Doe can demonstrate that the University's failure to stop the campaign of sexual harassment resulted from the University's sexual discrimination against her. *See Bosley v. Kearney R-1 School Dist.*, 904 F.Supp. 1006 (W.D.Mo. 1995) (citations omitted) (protected persons have a private right of action under Ttle [sic] IX – for intentional sexual discrimination); *Doe v. Petaluma City School Dist.*, 830 F.Supp. 1560, 1576 (N.D.Cal. 1993) (plaintiff must demonstrate discriminatory intent before a school district can be held liable for failure to stop peer sexual harassment). These cases support the Magistrate Judge's conclusion, and after reviewing this and other relevant case law, this Court elects to follow the aforementioned decisions. Count I is dismissed without prejudice, and Jane Doe has 21 days to replead.

Count II of the Complaint alleges that the University recklessly failed to stop the peer sexual harassment. The

Magistrate Judge's discussion of whether a reckless standard would apply is adopted in full. (Report & Recommendation, at 20-33.) Count II is dismissed with prejudice because in a non-agency context, Title IX requires intentional discrimination. *See Doe v. Petaluma, supra* at 1576.

Count III of the Complaint, arising under § 1983, charges that each of the individual Defendants violated Jane Doe's civil rights. As the Magistrate Judge held, a plaintiff afforded a specific federal statutory remedy may not bypass the requirements of the statute to proceed under § 1983. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 101 S.Ct. 2615, 2626 (1981). Section 1983 claims are subsumed by Title IX. *See Williams v. School Dist. of Bethlehem,* 998 F.2d 168, 176 (3d Cir. 1993), *cert. denied,* 114 S.Ct. 689 (1994). Therefore, this Court dismisses Count III with prejudice.

Count IV alleges a violation of the Illinois Family Expense Act, 750 ILCS 65/15 (West 1993). The statute is derivative in nature and does not stand to provide a separate and independent cause of action. *Boesl v. Suburban Trust and Savings Bank,* 642 F.Supp. 1503, 1515 (N.D.Ill. 1986) (citations omitted). Plaintiffs have withdrawn the University as a Defendant to Count IV. However, as each of the individual Defendants have been dismissed, there is no tort action to which the Family Expense Act can attach. Therefore, Count IV is dismissed with prejudice.

Conclusion

After reviewing all of the relevant pleadings, this Court DENIES the parties' Objections to the Magistrate

Judge's Report & Recommendation and ADOPTS the Report & Recommendation in all respects. This Order terminates all individual Defendants. Count I is dismissed without prejudice with regard to the Defendant University, and Plaintiffs may replead. Plaintiffs have 21 days to replead Count I. Counts II, III, and IV are dismissed with prejudice. This matter is referred to Magistrate Judge Robert J. Kauffman for further proceedings.

IT IS SO ORDERED.

ENTERED this 29th day of March, 1996.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

JANE DOE, a minor, by JOHN DOE, individually as father and next friend; and JANET DOE, individually and as mother and next friend;	)	
Plaintiffs,	)	Case No. 95-2217
vs.	)	
UNIVERSITY OF ILLINOIS, a public corporation; ALICE DEAN DAVIS-SMITH, an individual; JOE CRAMES, an individual; HENRY MEARES, an individual; BARBARA L. WYSOCKI, an individual; WILLIAM R. SUTTON, an individual; THEODORE L. BROWN, an individual; SUSAN T. GONZO, an individual; LARRY R. FAULKNER, an individual;	)	
Defendants.	)	

REPORT AND RECOMMENDATION

(Filed Jan. 22, 1996)

This case involves an action brought by Plaintiffs John and Janet Doe on behalf of their minor daughter Plaintiff Jane Doe, and on behalf of themselves individually, against the Defendant University of Illinois (University) and the above-named University High School (Uni High) and University of Illinois teachers, counselors and officials in their individual capacities, under Title IX of

the Education Amendments of 1972 (20 U.S.C. § 1681, et seq. (1988 and Supp. 1995)), 42 U.S.C. § 1983 (1988 and Supp. 1995), and the Illinois Family Expense Statute (750 ILCS 65/15 (1993)). Jurisdiction to entertain the Plaintiffs' Title IX and Section 1983 claims is vested in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4); the Court additionally possesses supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) to hear the Plaintiffs' Illinois Family Expense Statute claim. The Plaintiffs' claims are currently before this Court upon the Defendants' Motion to Dismiss (#26) the Plaintiffs' Complaint (#1) pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). After reviewing the pleadings, memoranda and oral arguments presented by the parties, it is my recommendation pursuant to my authority under 28 U.S.C. 636(b)(1)(B), that the Defendant University's Motion to Dismiss be **GRANTED** without prejudice as to Count I of the Plaintiffs' Complaint, and **GRANTED** with prejudice as to Count II, and that the individual Defendants' Motion to Dismiss be **GRANTED** with prejudice as to Counts I, II, III and IV of the Plaintiffs' Complaint.

Statement of Facts and Issues

As alleged in the Plaintiffs' Complaint, Plaintiff Jane Doe is currently a 16-year-old girl who attends a private out-of-state school. (Pls.' Compl. ¶ 2.) From August of 1992 through May of 1994, Jane was a student at University High School in Urbana, Illinois, a public school for academically gifted children which is affiliated with the University of Illinois. (*Id.* at ¶¶ 17, 18.) Although a public

school, Uni High is affiliated with the Defendant University of Illinois, and the University is responsible for overseeing the administration of the school. During approximately a seventeen-month period from late January of 1993 through early May of 1994 while she attended Uni High, Plaintiff Jane Doe was subjected to an ongoing campaign of unwanted verbal and physical sexual harassment perpetrated by a group of male Uni High students (*Id.* at ¶ 19), which the Defendant University of Illinois and the Uni High and University of Illinois teachers, counselors and officials named as individual defendants in this case failed to stop despite numerous pleas for help by Plaintiff Jane Doe and her parents.

This onslaught of peer sexual harassment was allegedly precipitated by a popular Uni High male student's repeated sexual assaults of Plaintiff Jane Doe. (*Id.* at ¶ 24.) In November of 1992 during school hours and on school property, the student, who is referred to as "M" in the Plaintiffs' Complaint, pulled Jane who was thirteen at the time, onto his lap and despite her struggle unzipped her pants in front of several other students. (*Id.* at ¶ 20). On two subsequent occasions in December of 1992, M slipped his hands up Jane's sweater and grabbed her breasts while the two were having lunch at a restaurant with fellow Uni High students, and additionally tried to shove his hands down Jane's pants while they were waiting at a bus stop. (*Id.* at ¶ 21). M's sexual advances toward Plaintiff Jane Doe reached a crescendo on January 2, 1993, when M invited her to his home under the pretense of a group-gathering of Uni High students, and subsequently sexually assaulted her. (*Id* at ¶ 22).

Jane eventually told her parents in late January of 1993 of M's repeated and unwanted sexual assaults, and Janet and John Doe confronted M's parents. (*Id.* at ¶ 23). Upon learning that Jane had "ratted" on M to her parents, M and a group of male Uni High students who were M's friends, dubbed themselves the "posse" and began to sexually harass Plaintiff Jane Doe apparently as retribution for reporting M to her parents. (*Id.* at ¶ 24). The "posse's" subsequent sexual harassment of Jane included writing sexual epithets about her and drawing sexually explicit pictures of her on Uni High student desks, spitting on the Plaintiff and subjecting her to taunts in the school hallways, with one member of the group even allegedly exposing his genitals to the Plaintiff. (*Id.* at ¶¶ 25, 26, 28, 29). This harassment began to wear on Jane to such an extent that she sought psychological counseling by mid-February of 1993. (*Id.* at ¶ 31).

In late February of 1993, Plaintiff Jane Doe for the first time informed Defendant Uni High Principal Henry Meares about the continual harassment to which she was being subjected (*Id.* at ¶ 32). Although Defendant Meares offered words of encouragement to the Plaintiff, he took no action at this time to stop the "posse's" sexual harassment of Jane. Plaintiff John Doe next complained to Defendant Meares of Jane's plight in March of 1993, and Defendant Meares promised to remedy the situation. (*Id.* at ¶ 33). He subsequently detained Jane's entire class after school and threatened expulsion should the harassment continue. (*Id.*) The harassment did not stop, however, and although Jane's father spoke with Defendant Meares at least once a month during April, May and June of 1993 regarding the sexual harassment campaign

against Jane, the Defendant took no further corrective action. (*Id.* at ¶ 36).

The Does additionally enlisted the aid of Defendant Alice Dean Davis-Smith, a Uni High guidance counselor, and Defendant Joel Crames, the Assistant Director of Uni High, to combat the abuse. When Plaintiff Janet Doe spoke with Defendant Davis-Smith on April 15, 1993, and in May of 1993, the Defendant allegedly blamed Jane for the sexual harassment and told Janet Doe that it was " . . . Jane who has to change." (*Id.* at ¶¶ 35, 36). Plaintiff Janet Doe subsequently sent Defendant Davis-Smith a letter on May 21, 1993, outlining the incidents of sexual harassment, but Davis-Smith sent the letter back to the Does with no comment. (*Id.* at ¶ 38). Throughout the months of April and May of 1993, Plaintiff Jane Doe also reported a number of the harassment episodes to Defendant Crames, whose response was that Jane should document the incidents of harassment in writing. (*Id.* at ¶ 39).

Plaintiffs John and Janet Doe met once again with Defendant Meares on June 23, 1993, in an effort to obtain reassurance from Meares that the prior harassment directed at Plaintiff Janet Doe during the course of the 1992-1993 school year would not be tolerated during the upcoming 1993-1994 academic year. (*Id.* at ¶ 41). The Defendant admitted during this meeting that Uni High had no peer sexual harassment policy in place, and was unable to offer any remedies that the school might take to halt the abuse. Frustrated with their failure to obtain any effective relief from Uni High's faculty and administration and having further run through the chain of command at the school, Plaintiffs John and Janet Doe

subsequently approached University of Illinois officials about their daughter's plight.

The Plaintiffs first contacted Defendant U of I Interim Vice Chancellor Ted Brown on July 2, 1993. After listening to the Does' story, Defendant Brown notified the Plaintiffs via a letter that Defendant Meares was working on a school sexual harassment policy which would be put into place by the fall of 1994 to combat such instances of harassment as Plaintiff Jane Doe had experienced. (*Id.* at ¶¶ 42, 43). The Plaintiffs assert in their Complaint that neither Defendant Meares nor Brown followed through with the solutions articulated in Brown's letter to the Does. (*Id.* at ¶ 43). John and Janet Doe additionally met with University of Illinois Police Captain Kris Fitzpatrick and University of Illinois administrator Mary Ellen O'Shaughnessey on July 14, 1993, to discuss the harassment directed toward Jane (*Id.* at ¶ 44). After interviewing Jane in August of 1993 and having the Does submit a list of goals to improve the environment at Uni High, O'Shaughnessey assured the Plaintiffs that remedial measures would be instituted at the school to combat the abuse and that Uni High students would be held accountable for their actions (*Id.* at ¶ 45).

Based upon these reassurances by Uni High and University of Illinois officials that any future incidents of sexual harassment would not be tolerated, Plaintiff Jane Doe returned to Uni High for the 1993-1994 school year. (*Id.* at ¶ 46). During the first week of the new school year, Defendant Crames spoke to the Uni High student body at an assembly, allegedly stating that he had experienced trouble with legal personnel and consequently was being

required to distribute a new student handbook. Defendant Crames subsequently read aloud in a mocking manner those prohibited sexual harassment behaviors listed in the book, eliciting laughter from the students. (*Id.* at ¶ 47). Although the Uni High Parent Faculty Organization ultimately approved the new student handbook for distribution at some point in September of 1993, the handbooks nonetheless went undistributed to Uni High students until May of 1994. (*Id.* at ¶ 48).

In the interim, the "posse's" sexual harassment of Plaintiff Jane Doe continued largely unabated. M had decided not to return to Uni High for the 1993-1994 school year, and friends of M blamed Jane for M's decision in this regard, subsequently recommencing their campaign of sexual harassment against the Plaintiff. (*Id.* at ¶ 49). During the fall of 1993, Jane was ridiculed to such an extent that she often refrained from participating in class discussions. (*Id.* at ¶¶ 50, 51). One male student referred to as "B" in the Plaintiffs' Complaint, who was also a friend of M's, along with other male students invented a point-tally system under which they scored their female constituents' physical appearance and classroom performance (*Id.* at ¶ 52). Female students were asked to "turn around" so that the boys could better judge their physical appearance, and if a female student participated in the class or cooperated with the teacher, points were deducted from her overall rating (*Id.*). Although the point tallies were announced at the end of class and Plaintiff Jane Doe even once showed the list to a teacher, no action was taken to stop the male students' rating game. (*Id.*)

Plaintiff Jane Doe was also subjected to unwanted physical sexual harassment during the fall of 1993. S, a male student in the Plaintiff's Latin class, sat in front of Jane during the class period and would reach behind and stroke Jane's leg, additionally attempting to force his hand up her skirt. (*Id.* at ¶ 53). Even though Jane attempted to avoid S' advances by moving her chair backwards until she was against the back wall of the classroom, and finally by changing her seat, S moved in front of the Plaintiff and continue [sic] his unwanted advances. (*Id.*) The Plaintiff again informed Defendant Meares of these instances of sexual harassment as advised by Defendant Crames, but Meares took no action to stop the "posse's" ongoing harassment of the Plaintiff. (*Id.* at ¶ 54).

By November of 1993, B and another male student referred to as "T" in the Plaintiffs' Complaint, had aimed their taunts at Plaintiff Jane Doe's best friend "E", an African-American girl who was also a Uni High student. (*Id.* at 57). When students called E a "whore" and "slut" and Jane defended her, the students' sexual harassment of Jane escalated. (*Id.*) B and his friends told Jane that she too was a "whore" and "slut"; B also showed the Plaintiff graphic pictures of naked women, frequently disrupted classes with vulgar sexual gestures such as grabbing his crotch and licking his lips, and exposed his buttocks to students during class. (*Id.* at ¶¶ 58, 59). In the face of this escalation of the "posse's" sexual harassment of Jane, Plaintiffs John and Janet Doe requested a meeting with Uni High interim principal Defendant Barbara Wysocki, who had replaced Defendant Meares in October of 1993,

to discuss the harassment campaign against their daughter.

At a meeting on January 21, 1994, with Defendant Wysocki, the Defendant informed the Does that Defendant University of Illinois' legal counsel was in the process of reviewing a proposed sexual harassment policy and procedure, and that Uni High's history teacher at that time, Defendant William R. Sutton, had been appointed the "intake person" for all sexual harassment complaints. (*Id.* at ¶ 61). Defendant Wysocki consequently informed the Plaintiffs that they should file a sexual harassment complaint with Defendant Sutton; however, since the Does were already involved in a complaint process with University of Illinois administrator Mary Ellen O'Shaughnessey, the Does declined to file a complaint with Sutton at that time. (*Id.*)

Plaintiff Jane Doe, her friend E, and another student referred to as "R" in the Plaintiffs' Complaint ultimately provided O'Shaughnessey with a list documenting the incidents of sexual harassment, and O'Shaughnessey subsequently implemented investigative procedures. (*Id.* at ¶¶ 62, 63). In late January of 1994, U of I police official Vicki Hawley and O'Shaughnessey interviewed seventeen Uni High students who corroborated most of Jane and E's allegations of the sexually hostile environment at the school. (*Id.* at ¶ 63). Although O'Shaughnessey later forwarded the results of the investigation to Defendant Wysocki on January 26, 1994, they were never published. (*Id.*) Uni High students, however, had learned of the investigation and immediately retaliated against Plaintiff Jane Doe and E. (*Id.* at 65).

Students called Jane and E "bitches" and informed Jane that the problems at Uni High were her fault; they said that Jane should be killed and discussed pooling their money to purchase a gun and murder Jane and E. (*Id.*) Plaintiff Jane Doe, E, and R subsequently approached Defendant Crames about the increased harassment, since he had promised to protect the girls if they chose to participate in O'Shaughnessey's investigation. Defendant Crames, however, was less then [sic] receptive to the girls' pleas for help. Crames told Jane, E and R to "separate the wheat from the chaff" and to start acting like "normal females," and additionally scolded them for making allegations which could adversely affect B's and T's futures. (*Id.* at ¶ 66). Although B and T were ultimately suspended from school for ten days as a result of their role in harassing the Plaintiff, other students who participated in the harassment campaign were not disciplined. (*Id.* at ¶ 68).

On February 3, 1994, Plaintiff Janet Doe contacted Defendant Susan Gonzo, the liaison between the University of Illinois and Uni High, concerning the sexual harassment directed at Jane. Defendant Gonzo acknowledged that she had personally been aware of Jane's plight since July of 1993, but had nonetheless failed to take any action to stop the abuse. (*Id.* at ¶ 69). Defendant Wysocki subsequently spoke to Plaintiff Jane Doe's freshmen class on February 4, 1994, and informed the students that B and T would be returning to school after completing their suspension (*Id.* at ¶ 70). The class was encouraged to respond to the speech, and many apparently openly blamed Jane and E for the lecture. (*Id.*) Jane continued to perform poorly in her classes, and on February 15, 1994,

at the Does' request, B was transferred out of the Plaintiff's biology class prior to the unit covering sex education. (*Id.* at ¶¶ 72, 73).

With his transfer, B's harassment of Jane resumed; B called the Plaintiff a "bitch," "whore," and "slut," and informed his classmates that Jane rather than he was the problem and should be moved out of the class. (*Id.* at ¶ 73). Other students followed suit and wrote threatening messages concerning the Plaintiff on school desks. (*Id.* at ¶ 74). Plaintiff Janet Doe notified Defendants Crames, Wysocki and Gonzo of the threats and harassment. Wysocki and Crames ignored Jane's mother's complaints, and Gonzo indicated that the Does should be satisfied with the school's prior suspension of B and T as a resolution to the harassment problem. (*Id.* at ¶ 75). The students' harassment of Jane continued, and although Plaintiff Janet Doe contacted Defendant Sutton, the Uni High "intake person" for sexual harassment complaints, on numerous occasions to discuss this ongoing problem, Sutton ignored Janet Doe's messages and refused to speak with her. (*Id.* at ¶ 78).

Throughout March of 1994, B continued to taunt Jane. In between classes during the school day B would yell down the hallway at the Plaintiff, calling her an "asshole" and "mother fucking bitch." (*Id.* at ¶ 79). On March 14, 1994, the Plaintiffs sent letters to a number of University of Illinois officials, including the University of Illinois Vice Chancellor of Academic Affairs, Defendant Larry Faulkner, seeking aid once again in ending the ongoing harassment which Plaintiff Jane Doe was experiencing at Uni High. (*Id.* at ¶ 80). According to the Does, they never received any replies to their letters. (*Id.*) Consequently,

the Plaintiffs once again sought help from Uni High officials.

In late March of 1994, Plaintiff Jane Doe informed Defendant Sutton that she wanted to file a formal sexual harassment complaint against B. Sutton strongly advised Jane not to file the complaint and refused to accept the complaint from Jane. (*Id.* at ¶ 81). Plaintiff John Doe also approached Defendant Sutton for help, writing him a letter on March 22, 1994, in which John Doe pleaded with Sutton to protect Jane and her friend E from B's continuing harassment and intimidation. (*Id.* at ¶ 82). Sutton replied that while he did not have the power or inclination to discipline students, that he nonetheless would make an effort to eradicate the harassment at Uni High. (*Id.*) Because Defendant Sutton had claimed that he lacked the power to discipline the offending students, Plaintiff John Doe on March 23, 1994, forwarded to Defendant Wysocki a copy of his letter to Sutton and Sutton's response. (*Id.* at ¶ 83).

On that same day, Plaintiff Jane Doe approached Defendant Wysocki and informed her that she wished to file a formal sexual harassment complaint against B, on the basis that B had violated a number of rules in the Uni High student handbook while he was on probation following his prior suspension. (*Id.* at ¶ 84). Defendant Sutton intervened in the meeting and took the side of the male students in the dispute. He told Jane that the boys who had been harassing her had a good reason for not liking her, and advised her to meet with the boys. (*Id.*) Defendant Sutton ultimately dissuaded Jane from filing her complaint. The Plaintiff was allegedly so traumatized by this meeting that she was unable to attend school the

next day. (*Id.*) Plaintiffs John and Janet Doe attempted to repeatedly contact Defendant Wysocki following this meeting in order to ascertain why their daughter was prevented from filing a sexual harassment complaint, but Wysocki never returned the Does' calls. (*Id.* at ¶ 85).

The Plaintiffs were finally successful in filing a sexual harassment complaint with Defendant Sutton on March 29, 1994, after Plaintiff Janet Doe accompanied Jane to Sutton's office. (*Id.* at ¶ 86). Plaintiff Janet Doe subsequently met with Defendants Wysocki and Gonzo, and University of Illinois Ombudsperson Jacque Bowman, to discuss the ongoing sexual harassment campaign directed at Jane. (*Id.* at ¶ 87). Bowman reported that Jane had filed a harassment complaint, and Defendant Wysocki criticized Jane for doing so. (*Id.*) Plaintiff Jane Do complaint, however, was never investigated by Uni gh or University of Illinois officials. (*Id.*) In the meantime, the sexual harassment directed at Jane and her friend E continued.

During the second week of May 1994, Uni High students wrote obscene and hateful comments about Plaintiff Jane Doe in each other's school yearbooks, and defaced Jane's and E's class photos. (*Id.* at ¶ 88). The newly elected class president vowed to "drive Orlando (Jane's middle name) out of school" the following year. (*Id.*) On May 17, 1994, B was allowed to videotape a skit performed by Plaintiff Jane Doe and other students in their English class. On the tape, B narrated that he was "zoooooming in" and subsequently focused the camera on Jane's crotch. (*Id.* at ¶ 89). The teacher showed the tape in the Plaintiff's and another class, much to the amusement of the students. (*Id.*) Although Jane showed

the tape to Defendant Wysocki who admitted that B's behavior was inappropriate, Wysocki took no action to discipline B. (*Id.*)

In late May of 1994, Plaintiffs John and Janet Doe met with University of Illinois administrator Mary Ellen O'Shaughnessey, University of Illinois Ombudsperson Jacque Bowman, Audrey Wells, who was the Uni High faculty sponsor for Jane's freshman class, and Defendants Wysocki and Sutton. (*Id.* at ¶ 90). At this meeting the Does focused on the prior sexual harassment directed against their daughter and attempted to discuss remedial measures which would allow Jane to continue her education at Uni High. (*Id.*) The University of Illinois officials in attendance at this meeting in the Does' perception were neither supportive nor encouraging, consequently leaving John and Janet Doe with the impression that they had no alternative but to remove their daughter from Uni High in order to end the harassment. (*Id.* at ¶ 91). Plaintiff Jane Doe was subsequently enrolled in a private out-of-state school for the 1994-1995 school year, and has remained in attendance there.

Plaintiffs Jane, John and Janet Doe subsequently filed this suit on May 24, 1995, against Defendant University of Illinois and Defendants Crames, Davis-Smith, Meares, Sutton, Wysocki, Brown, Gonzo and Faulkner, in their individual capacities, seeking compensatory and punitive damages for the Defendants' alleged violations of Title IX and 42 U.S.C. § 1983 in failing to stop the sexual harassment campaign directed at Jane Doe while she was a student at Uni High, and additionally seeking damages under the Illinois Family Expense Statute for those medical and tuition expenses incurred by Janet and John Doe

in obtaining psychological counseling for their daughter and sending her to a private school. In Count I of their Complaint, the Plaintiffs have specifically alleged that each of the Defendants' failures to stop the sexual harassment directed at their daughter constituted intentional sexual discrimination in violation of Title IX. The Plaintiffs have alternatively pleaded in Count II that the Defendants' failure in this regard constituted reckless sexual discrimination in violation of Title IX.

Count III is directed only against the individual Defendants. In this count the Plaintiffs have incorporated those allegations of Counts I and II, and allege that each individual Defendant's Title IX violation of failing to stop the sexual harassment directed against Plaintiff Jane Doe additionally constituted a violation of 42 U.S.C. § 1983. The Plaintiffs further allege in this count that the individual Defendants' failure to halt the sexual harassment also violated Plaintiff Jane Doe's Fourteenth Amendment constitutional right to equal protection of the law, again in violation of 42 U.S.C. § 1983. Each of the Plaintiffs finally pleads in Count IV of their Complaint against all Defendants that pursuant to the Illinois Family Expense Statute (750 ILCS 65/15), they are entitled to reimbursement from the Defendants of those expenses incurred by the Does in obtaining psychological counseling for Jane Doe in order to help her cope with the sexual harassment, as well as those tuition and travel costs incurred by the Does in enrolling Jane in an out-of-state private school.

The Defendant University of Illinois and the individually-named Defendants have filed a combined Motion to Dismiss the Plaintiffs' Complaint in its entirely pursuant to Federal Rules of Procedure 12(b)(1) and (6). With

regard to the Title IX claims presented in Counts I and II of the Plaintiffs' Complaint, all individual Defendants argue that they are entitled to the dismissal of both counts pursuant to Rule 12(b)(6) on the basis that no Title IX cause of action exists against individuals as a matter of law. (Defs.' Mot. Dismiss ¶ 3). All Defendants argue that the Plaintiffs' claim of reckless sexual discrimination in violation of Title IX advanced in Count II must be dismissed pursuant to Rule 12(b)(6) on the basis that only intentional sexual discrimination is actionable under Title IX. (*Id.* at ¶ 4). All of the Defendants additionally assert that they are entitled to the Rule 12(b)(6) dismissal of Plaintiff's Count I claim of intentional sexual discrimination on the basis that the alleged behavior of the Defendants at issue in this count – their failure to halt the peer sexual harassment directed at Jane – does not as a matter of law constitute intentional discrimination on the basis of sex in violation of Title IX. (*Id.* at ¶ 5).

With regard to the Plaintiffs' Section 1983 claims presented in Count III of their Complaint, the individual Defendants maintain that this count must be dismissed pursuant to Rule 12(b)(6) on the basis that these claims are subsumed by the Plaintiffs' Title IX cause of action. (*Id.* at ¶ 7). The individual Defendants alternatively argue that they are entitled to the Rule 12(b)(6) dismissal of the Plaintiffs' Section 1983 claims on the premise that the Defendants as a matter of law were under no duty to protect Plaintiff Jane Doe from peer sexual harassment as alleged by the Plaintiffs in Count III of their complaint. (*Id.* at ¶ 6).

Concerning Counts I through III collectively of the Plaintiffs' Complaint, the individual Defendants alternatively assert that these three counts should be dismissed pursuant to Rule 12(b)(6) because these Defendants are qualifiedly immune from suit in their individual capacities for the Title IX and Section 1983 causes of action directed against them in these counts. (*Id.* at ¶ 8). Both the individual Defendants and Defendant University of Illinois also alternatively argue that they are entitled to Rule 12(b)(6) dismissal of those portions of the Plaintiffs' Title IX and Section 1983 which are premised upon sexual harassment incidents occurring prior to May 23, 1993, on the basis that these claims are barred by the applicable two-year statute of limitations. (*Id.* at ¶ 9) All of the Defendants finally alternatively argue that Plaintiffs John and Janet Does' individual claims must be dismissed from Counts I, II and III for lack of standing. (*Id.* at ¶ 10).

In terms of the Illinois Family Expense Statute claim presented in Count IV of the Plaintiffs' Complaint, both the individual Defendants and Defendant University of Illinois assert that should Plaintiffs' federal Counts I, II and III be dismissed as to the Defendants, that Count IV must be dismissed pursuant to Rule 12(b)(1) since a basis will no longer exist upon which this Court may premise supplemental jurisdiction over the state law claim presented in Count IV, and must additionally be dismissed pursuant to Rule 12(b)(6) should the Plaintiff's federal claims be stricken given that Illinois Family Expense Statute claims are derivative rather than independent causes of action which must be attached to a valid underlying claim. (*Id.* at ¶ 12). The Defendants alternatively argue

that even if the federal claims directed against them survive their Motion to Dismiss that they are nonetheless entitled to a Rule 12(b)(1) dismissal of Count IV for a lack of jurisdiction on the basis that they are immune from suit under state law in federal court pursuant to the Eleventh Amendment of the United States Constitution. (*Id.* at ¶ 13). Finally, the individual Defendants argue in their reply in support of their motion to dismiss, that should Count IV withstand the Defendants' attacks upon this Court's jurisdiction over this count, that Count IV must nonetheless be dismissed under Rule 12(b)(6) on the basis that the Plaintiffs may not properly claim therapy and tuition expenses under the Act (Defs.' Reply Supp. Mot. Dismiss pp.13-14), and even if this Court disagrees with this assertion and finds that Count IV may proceed, that Plaintiff Jane Doe must at least be dismissed with prejudice from this count again pursuant to Rule 12(b)(6) since an Illinois Family Expense Statute claim for injuries suffered by a child inures only to the child of the parents and not to the child (*Id.*).

Standard for Evaluating Defendants' Rule 12(b)(1) and (b)(6) Motions to Dismiss

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a plaintiffs' complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 78 S.Ct. 99, 102 (1957). Further, the factual allegations of the complaint are to be construed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 94 S.Ct. 1683, 1686 (1974).

A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack" by a defendant upon the court's subject matter jurisdiction of the plaintiff's cause of action. Where a facial attack is made upon the court's subject matter jurisdiction as alleged in the complaint, a defendant merely questions whether the plaintiff has sufficiently pleaded a factual basis for the exercise of the court's subject matter jurisdiction over the claim. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In contrast, where a defendant makes a factual attack upon the court's subject matter jurisdiction, although the plaintiff's allegations of jurisdiction in his or her complaint may have been adequately factually pleaded, it is the defendant's contention that these jurisdictional allegations are nonetheless factually untrue. *Adams*, 697 F.2d at 1219.

In the case at hand the Defendants' attacks upon this Court's subject matter jurisdiction to entertain Count IV of the Plaintiffs' Complaint constitute facial attacks upon the court's jurisdiction in this regard, since this Court need look no further than the face of the Plaintiffs' Complaint in order to ascertain whether the Defendants' attacks upon this Court's subject matter jurisdiction to entertain Count IV justify dismissal under Rule 12(b)(1). In reviewing such a facial attack upon a court's subject matter jurisdiction, the court as in evaluating a Rule 12(b)(6) motion to dismiss must accept the allegations of the plaintiff's complaint as true. *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 324 (6th Cir. 1990); *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990).

As an initial matter, after the Defendants submitted their Motion to Dismiss, Plaintiffs John and Janet Doe

conceded that they lacked standing to bring those Title IX and Section 1983 claims presented in Counts I, II and III on behalf of themselves individually, given that these claims are premised solely upon injuries allegedly suffered by Plaintiff Jane Doe rather than any injury sustained by John or Janet Doe, and agreed to voluntarily withdraw their individual claims from Counts I through III. (Pls.' Agreed Mot. Withdraw Certain Claims (#32) ¶ 3(a)). The Defendants' motion to dismiss John and Janet Does' individual claims from these three counts has thus been rendered moot and need not be addressed by this court. Each of the Plaintiffs further conceded in their Agreed Motion to Withdraw Certain Claims that the Defendant University of Illinois could not be subject to damages under the Illinois Family Expense Statute, and agreed to withdraw their claim in this regard against the Defendant University from Count IV. (*Id.* at ¶ 3(b)). Consequently, this Court additionally need not address in its Report and Recommendation the Defendants' request for the dismissal of the Defendant University from Plaintiffs' Count IV.

Plaintiff Jane Doe's Count I and Count II Title IX Claims

As noted in the preceding section of this Report and Recommendation, Plaintiff Jane Doe has respectively asserted in Counts I and II of the Plaintiffs' Complaint, claims of intentional and reckless sexual discrimination on the part of all Defendants in violation of Title IX, 20 U.S.C. § 1681, et seq. (1988 and Supp. (1995)). The individual Defendants in their Motion to Dismiss assert that both counts must be dismissed against them on the basis

that Title IX does not provide for a cause of action against individuals, but only against educational institutions receiving federal funds. (Defs.' Mot. Dismiss ¶ 3). This Court agrees with the individual Defendants that Title XI causes of action are not permitted against individuals, thus requiring their dismissal from Counts I and II of the Plaintiffs' Complaint.

The purpose of Title IX is to prevent educational institutions which receive federal assistance from discriminating on the basis of sex. 20 U.S.C. § 1681(a) (1988 and Supp. (1995)). Title IX specifically provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

20 U.S.C. § 1681(a) (1988 and Supp. (1995)). Although neither the United States Supreme Court nor the Seventh Circuit Court of Appeals to-date has directly addressed the issue of whether individual employees or officials of those educational institutions which receive Title IX funding may be sued for damages under Title IX, the clear majority of courts which have considered this issue have determined that Title IX liability may not be imposed upon such individual defendants. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Clay v. Bd. of Trustees of Neosho County Community College*, 1995 WL 646537 at *5 (D.Kan. 1995); *Seamons v. Snow*, 864 F.Supp. 1111, 1116 (D. Utah 1994); *Slaughter v. Waubansee Comm. College*, 1994 WL 663596 at *2 (N.D. Ill. 1994); *Bustos v. Illinois Inst. of Cosmetology*, 1994 WL 710830 at *2 (N.D. Ill. 1994); *Aurelia*

D. v. Monroe County Bd. of Educ., 862 F.Supp. 363, 367 (M.D. Ga. 1994); *Garza v. Galena Park Indep. Sch. Dist.*, 1994 WL 809932 at *1 (S.D. Tex. 1994); *Bowers v. Baylor Univ.*, 862 F.Supp. 142, 145-46 (W.D. Tex. 1994); *Doe v. Petaluma*, 830 F.Supp. 1560, 1576-77 (N.D. Cal. 1993); *Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 143, 149 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989); *Bagley v. Hoopes*, 1985 WL 17643 at *5-7 (D.Mass. 1985). *Contra Mennone v. Gordon*, 889 F.Supp. 53, 55-58 (D.Conn. 1995).

The rationale behind the conclusion that Title IX does not allow for actions against individual defendants is that since Title IX by its language prohibits discrimination against beneficiaries of only programs and activities which receive federal financial assistance (20 U.S.C. § 1681(a)), it is the educational institution itself which must be sued for violations of Title IX, since it is the institution rather than any of its employees or officials which receive the federal funding that in turn subjects the educational institution to the proscriptions of Title IX. *Petaluma*, 830 F.Supp. at 1576-77. As explained by the court in *Doe v. Petaluma*, this conclusion is supported by Title IX's statutory provision for administrative enforcement, Section 902 (20 U.S.C. § 1682), which refers only to those actions of enforcement that federal agencies may take against institutions which are recipients of federal funds. *Id.* at 1577.

Under Section 902, the ultimate sanction for noncompliance with Title IX is the termination of an offending educational institution's federal funds or the denial of any future federal grants to that institution. *Id.* (citing *North Haven Bd. of Educ. v. Bell*, 102 S.Ct. 1912, 1930

(1982)). Thus, even though the United States Supreme Court in its decisions of *Cannon v. University of Chicago*, 99 S.Ct. 1946 (1979), and *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), has determined that a private right of action for damages exists under Title IX against educational institutions which are recipients of federal funds and have allegedly violated Title IX's mandate against nondiscrimination, the fact that Title IX administrative enforcement is directed solely at such institutions suggests that the private enforcement right should primarily be limited to actions against the educational institution itself. *Id.*

This Court is persuaded by the above reasoning of those cases holding that individual liability does not lie under a Title IX cause of action, and accordingly recommends dismissal of the individually-named Defendants in this case form Counts I and II of the Plaintiffs' Complaint with prejudice. Plaintiff Jane Doe argues in her Response to Defendants' Motion to Dismiss that the individual Defendants named in Counts I and II of her Complaint exercised a sufficient level of control over the Uni High educational program such that they may be held individually accountable under Title IX for the sexual harassment directed at the Plaintiff which the Defendants allegedly failed to remedy, and specifically cited the case of *Mennone v. Gordon* in support of her argument in this regard. (Pls.' Resp. Defs.' Mot. Dismiss, pp.6-8). After examining the *Mennone* decision, however, this Court finds itself in disagreement with the analysis conducted by the *Mennone* court in finding such individuals who exercise control over an educational institution's programs or activities liable under Title IX, and consequently

declines to adopt the holding of *Mennone* over what it views at the better-reasoned decisions of the majority of cases finding no such liability.

With Defendant University of Illinois remaining as the only defendant in Plaintiff Jane Doe's Title IX counts, this Court will now address those grounds for dismissal raised by that Defendant as to Counts I and II of the Plaintiffs' Complaint. In pleading Title IX intentional sexual discrimination on the part of the Defendant University in Count I of her Complaint, Plaintiff Jane Doe has specifically alleged that the peer sexual harassment to which she was subjected was severe and pervasive, consequently creating an abusive and hostile educational environment which made the Plaintiff's life at Uni High intolerable (Pls.' Compl. ¶ 93), and that the Defendant University's failure to appropriately respond to the Plaintiffs' complaints and stop the student sexual harassment campaign directed at her constituted intentional sexual discrimination in violation of Title IX (*Id.* at ¶¶ 95-96). Plaintiff Jane Doe is thus asserting a hostile environment sexual harassment theory in Count I of her Complaint, with the Defendant University's liability for this environment premised upon its alleged failure to stop the sexual harassment directed at the Plaintiff.

The Defendant University argues that the Plaintiff's Count I claim of intentional sexual discrimination must be dismissed pursuant to Rule 12(b)(6), on the basis that its alleged failure to take appropriate steps to stop the peer sexual harassment campaign directed toward Plaintiff Jane Doe does not as a matter of law constitute intentional sexual discrimination in violation of Title IX. (Defs.' Mot. Dismiss ¶ 5). In support of this assertion, the

Defendant University points to a line of cases in which courts have held that hostile sexual environment harassment claims premised upon an educational institution's failure to stop student-on-student sexual harassment are unactionable under Title IX, the rationale behind these cases being that the sexually-harassing and thus sexually-discriminatory behavior directed at the plaintiff-student is perpetrated by other students rather than the educational institution itself, such that this behavior does not constitute intentional sexual discrimination against the plaintiff-student on the part of the federally-funded educational provider itself as it allegedly relied in order to find a violation of Title IX. *Auerlia D. v. Monroe County Bd. of Educ.*, 862 F.Supp. at 367; *Garza v. Galena Park Indep. Sch. Dist*, 1994 WL at *1; *Seamons v. Snow*, 864 F.Supp. at 118; *Ruh v. Samerjan*, 816 F.Supp. 1326, 1331 (E.D. Wisc, 1993), *aff'd. on other grounds*, 32 F.3d 570.

Plaintiff Jane Doe, however, in her Response to Defendants' Motion to Dismiss has directed this Court to an additional set of cases which has reached the opposite conclusion of those cases cited by the Defendant University – namely, that the failure of an educational institution receiving federal funds to halt peer sexual harassment and thus dissipate a sexually hostile learning environment can indeed constitute a violation of Title IX, where the educational institution's failure to remedy or stop the peer sexual harassment campaign is motivated by an intent to discriminate against the victimized student on the basis of his or her sex. *Mennone v. Gordon*, 889 F.Supp. 53 (D.Conn. 1995); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F.Supp. 1006 (W.D. Mo. 1995); *Doe v. Petaluma City Sch. Dist.*, 830 F.Supp. 1560 (N.D. Cal. 1993). After careful

consideration of the reasoning behind both lines of cases, this Court finds that those cases cited by the Plaintiff present the better rule such that Plaintiff Jane Doe's Count I claim of a sexually hostile environment may withstand the Defendant University's Motion to Dismiss, so long as the Plaintiff has alleged that the Defendant's failure to stop the peer sexual harassment campaign directed against her was motivated by an intent on the part of the University to discriminate against the Plaintiff on the basis of her sex.

In addressing the Defendant University's argument that the Plaintiff's hostile environment sexual harassment claim is unactionable under Title IX on the basis that an educational institution's failure to remedy peer sexual harassment simply does not constitute intentional sexual discrimination as is required in order to find a violation of Title IX, two distinct issues must be resolved: first, whether hostile environment sexual harassment claims, originally a Title VII concept for holding an employer liable for coworker sexual harassment, are additionally actionable under Title IX within the context of a peer sexual harassment claim; and secondly, if such claims are indeed actionable under Title IX, then which standard of liability should be imposed in order to hold an educational institution accountable for its failure to remedy the peer sexual harassment upon which a student's Title IX hostile environment sexual harassment claim is based. This latter question in turn involves the determination of whether Title VII's hostile environment sexual harassment standard of negligence should be imposed upon an educational institution in order to find a Title IX violation, such that the institution would be held liable for its

failure to stop the peer sexual harassment if it either knew or should have known that the harassment was occurring and failed to take any appropriate remedial action, or whether the educational institution should only be held accountable under Title IX for its inaction despite its knowledge of the peer sexual harassment campaign where its failure to act was motivated by an intent to discriminate on the basis of sex.

Addressing first the question of whether Title VII's hostile environment sexual harassment employment claims should also be actionable under Title IX where peer sexual harassment is at issue, this Court finds after conducting a review of the applicable case law that such sexually hostile environment claims are indeed actionable under Title IX. As already noted in the preceding paragraph, the concept of hostile environment sexual harassment originated within the context of Title VII. Since 1976, when a federal court first held that sexual harassment was a form of sex discrimination actionable under Title VII, the courts have recognized that such harassment can take two forms within the employment context. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988). One form, termed "quid pro quo" harassment, occurs when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate employee, or punishes that subordinate for refusing to comply. *Id.*

The second, coined "hostile environment" harassment, occurs when one or more supervisors or coworkers create an atmosphere so infused with hostility toward members of one sex that they alter the conditions

of employment for them (*Id.*), essentially forcing the victimized man or woman "[to] run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." (*Id.* (quoting *Meritor Savings Bank, FSB v. Vinson*, 106 S.Ct. 2399, 2406 (1986)). Where an employee has alleged such a sexually hostile environment claim pursuant to Title VII, his or her employer through agency principles can be held liable for other employees' sexual harassment of and thus sexual discrimination against the plaintiff-employee in violation of Title VII, where the employer either knew or should have known that the harassment was occurring but still failed to stop it. *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983). The employer can thus be held liable under Title VII for coemployee sexual harassment where the employer is negligent in failing to stop the harassment.

Although Title IX by its language like Title VII prohibits sexual discrimination, it provides no substantive standards within its statutory framework for determining what actions constitute sexual discrimination. Consequently, because Title VII prohibits sexual discrimination as does Title IX, a number of courts have viewed Title VII as the most appropriate analogue when defining Title IX's substantive standards for determining when sexual discrimination has occurred within the meaning of Title IX. *Id.* at 896 (citing *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 148 (1987); *O'Connor v. Peru State College*, 781 F.2d 632, 642 n.8 (8th Cir. 1986); and *Nagel v. Avon Bd. of Educ.*, 575 F.Supp. 105, 106 (D.Conn. 1983)). The Title VII doctrine of quid pro quo sexual

harassment has thus been extended to Title IX claims of such harassment perpetrated by a teacher toward a student (*Alexander v. Yale Univ.*, 459 F.Supp. 1 (D.Conn. 1977), *aff'd.* 631 F.2d 178 (2nd Cir. 1980). Further, Title VII's hostile environment sexual harassment doctrine, including its negligence standard for imputing coemployee sexual harassment to an employer, was adopted in its entirety in the cases of *Lipsett v. University of Puerto Rico*, and *Patricia H. v. Berkeley Unified School District*, 830 F.Supp. 1288 (N.D. Cal. 1993), in allowing a student (*Patricia H.*) and an employee (*Lipsett*) of an educational institution to maintain Title IX hostile environment sexual harassment claims against the educational institution, which were in turn premised upon sexual harassment directed respectively at the plaintiff-student and plaintiff-employee by other employees of the educational institution, based upon the institution's subsequent failure to stop the harassment after being notified of the problem by the student and employee.

In reaching its holding in *Lipsett* that Title VII's standards for assessing hostile environment sexual harassment claims are equally applicable to such claims brought under Title IX within the employment context, the First Circuit Court of Appeals relied upon EEOC guidelines which recommend applying Title VII standards in evaluating claims of employment discrimination perpetrated by federally-funded educational institutions, and additionally looked to the legislative history of Title IX indicating that this Act was meant to close a loophole in Title VII by extending the former's prohibitions to educational institutions. *Doe v. Petaluma*, 830 F. Supp. at 1571 (citing

Lipsett, 864 F.2d at 897). The *Lipsett* court, however, specifically limited its application of the Title VII hostile environment sexual harassment doctrine to Title IX employment claims of a sexually hostile environment perpetrated by an educational institution, and noted that it was not ruling upon the type of standard which should apply when a student claims hostile environment sexual harassment by an educational institution under Title IX. *Id.* at 1571-72; *Lipsett*, 864 F.2d at 897.

A few courts subsequent to the *Lipsett* decision were confronted with and split on the question of whether Title VII's hostile sexual environment harassment doctrine should be additionally extended to a student's sexually hostile environment Title IX claim against a federally-funded educational institution, where the cause of the educational institution's alleged Title IX violation was its failure to remedy its employee's sexual harassment of the student. In the first of these cases, *Bougher v. University of Pittsburgh*, 713 F.Supp. 139 (W.D.Pa. 1989), *aff'd on other grounds*, 882 F.2d 74 (3rd Cir. 1989), although the United States District Court for the Western District of Pennsylvania determined that a teacher's quid pro quo sexual harassment of a student should be actionable under Title IX, the court with minimal discussion nonetheless concluded that Title VII's hostile environment sexual harassment doctrine should not be extended to provide an actionable claim under Title IX, where a student claims that a teacher or other employee of an educational institution sexually harassed the student thus subjecting the student to a sexually hostile learning environment, and the educational institution's liability under Title IX is

premised upon its failure to remedy the alleged harassment after receiving notice from the student of the problem. *Bougher,* 713 F.Supp. at 145.

The United States District Court for the Northern District of California, however, in the subsequent case of *Patricia H. v. Berkeley Unified School District,* reached a conclusion opposite the *Bougher* decision, specifically ruling that a hostile environment sexual harassment claim may be brought under Title IX by a student against an educational institution attended by the student, based upon the alleged sexual harassment of the student by a teacher or other employee of the institution and the failure of the educational institution to stop the harassment after being notified of its occurrence. *Patricia H.,* 830 F.Supp. at 1293; *accord Bustos v. Illinois Institute of Cosmetology,* 1994 WL at *2. In reaching this decision, the *Patricia H.* court first rejected the *Bougher* holding that hostile environment sexual harassment claims are unactionable under Title IX, emphasizing the *Bougher* court's lack of analysis in drawing this conclusion as well as the explicit refusal of the Third District Court of Appeals to affirm this particular aspect of the *Bougher* decision in ruling on the plaintiff's appeal in that case. *Id.* at 1291.

The *Patricia H.* court then engaged in a detailed analysis as to whether Title VII's sexually hostile environment doctrine should be extended to Title IX such that an educational institution, as the employer of a teacher or other offending employee, should be held liable for the teacher or employee's sexual harassment of a student, ultimately ruling that such claims are indeed actionable under Title IX. In reaching this conclusion, the district court cited the legislative history of Title IX referred to in

Lipsett which indicated that Title IX was patterned after Title VII; the United States Supreme Court's reliance in *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992), on the Title VII hostile environment sexual harassment case of *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986), in analyzing the plaintiff-student's claims in *Franklin* of intentional sexual discrimination under Title IX; the *Lipsett* and *Mabry* appellate court opinions that had already adopted Title VII standards in assessing employment discrimination claims under Title IX; and finally, the policy of the Office of Civil Rights of the Department of Education of applying Title VII standards within the Title IX context. *Doe v. Petaluma*, 830 F.Supp. at 1572.

The courts in *Lipsett* and *Patricia H.*, thus concluded that the Title VII concept of hostile environment sexual harassment is properly applicable in defining the substantive standards to be used in determining when sexual discrimination has occurred in violation of Title IX, such that hostile environment sexual harassment claims are indeed actionable under Title IX, at least where the sexual harassment at issue has been perpetrated by an employee of the educational institution. Further, in concluding that such sexually hostile environment claims were actionable under Title IX, the courts in *Lipsett* and *Patricia H.* also adopted Title VII's negligence standard in assessing the liability of the educational institution in each case for its failure to remedy the sexual harassment at issue, given that the institutions' liability in these two cases was premised upon an agency theory, as is an employer's liability in Title VII coemployee hostile sexual environment claims.

Although neither *Lipsett* nor *Patricia H.* dealt with the question of whether peer hostile environment sexual harassment claims should additionally be actionable under Title IX, and if so what standard of fault should be employed in determining an educational institution's liability in such a situation, the reasoning behind these two decisions nonetheless provided the foundation for the subsequent case of *Doe v. Petaluma School District*, 830 F.Supp. 1560 (N.D. Cal. 1993), in which another district court out of the Northern District of California determined that such claims of peer sexual harassment are indeed actionable under Title IX, but that an educational institution must have intentionally discriminated on the basis of sex in failing to remedy the alleged peer sexual harassment in order to have violated Title IX. In *Doe v. Petaluma*, the plaintiff, a female junior high school student, brought a Title IX peer hostile environment sexual harassment claim against the school districts which managed her junior high, in which the plaintiff-student specifically alleged that the negligent failure of school officials to take appropriate action to stop an approximately year-and-a-half long campaign of sexual harassment perpetrated by the school's other students against the plaintiff constituted intentional sexual discrimination in violation of Title IX. *Id.* at 1576.

The defendants-school districts subsequently filed a motion to dismiss the plaintiff-student's Title IX sexually hostile environment claim on the bases that Title IX does not prohibit hostile environment sexual harassment, and that even if such a cause of action were permissible under Title IX, that the plaintiff had nonetheless failed to state an actionable claim under Title IX since the Act required,

and the plaintiff had failed to allege, intentional sexual discrimination on the part of the school officials in failing to stop the peer harassment directed toward the plaintiff. *Id.* at 1571. In addressing the defendants' motion for dismissal, the *Petaluma* court first considered and rejected the defendants' contention that sexually hostile environment claims are generally unactionable under Title IX, specifically citing the cases of *Lipsett* and *Patricia H.* for the rule that hostile environment sexual harassment claims premised upon a federally-funded educational institution's failure to stop an employee's sexual harassment of another employee or a student are at least actionable under Title IX. *Id.* at 1571-72.

Relying upon the reasoning behind the decisions in *Lipsett* and *Patricia H.*, the *Petaluma* court then determined that a federally-funded educational institution's failure to stop peer sexual harassment should be actionable under Title IX as well. In reaching its conclusion that such peer hostile environment sexual harassment claims are additionally actionable under Title IX, the court in *Doe v. Petaluma* particularly emphasized as support for its decision prior case determinations of the Office of Civil Rights of the Department of Education, which had found that an educational institution's negligent failure to take adequate action to stop student-to-student sexual harassment constituted a violation of Title IX. *Id.* at 1573 (citing Letter of Findings by John E. Palomino, Regional Civil Rights Director, Region IX (May 5, 1989), Docket Number 09-89-1050, and Letter of Findings by Kenneth A. Mines, Regional Director Region V (Illinois) (April 27, 1993), Docket Number 05-92-1174).

Although acknowledging that Letters of Finding are not due the same deference as formal agency regulations, the *Petaluma* court nonetheless noted that some deference is due them given that they express the opinion of an agency charged with implementing Title IX and its regulations (*Id.*), and further since apparently the court's opinion, the agency's rulings in the Letters allowing peer sexual harassment claims were in accord with the Supreme Court's mandate to give Title IX a sweep as broad as its language (*Id.* at 1575). In the words of the *Petaluma* court,

> Surely one is 'denied the benefits of, or subject to discrimination under' an education program on the basis of sex [within the definition of Title IX] when, as alleged [in the case at hand], she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program. *Id.*

This Court finds itself in agreement with the holding reached in *Doe v. Petaluma* allowing claims of peer sexual harassment under Title IX, as well as with the reasoning employed by the *Petaluma* court in reaching that decision. The Court emphasizes, however, that in ruling that such claims of a sexually hostile environment are actionable under Title IX, the court in *Petaluma* did not adopt Title VII's hostile environment sexual harassment negligence standard for use in determining whether a federally-funded educational institution should be held liable for a Title IX violation in failing to stop peer sexual harassment directed at a plaintiff-student, and neither does this Court in the case at hand.

As alluded to earlier in the course of this discussion, the additional question faced by the *Petaluma* court in deciding whether peer hostile environment sexual harassment claims should be actionable under Title IX was what standard of fault which should be applied in determining an educational institution's liability in such a situation. Although the plaintiff-student in *Doe v. Petaluma* argued that Title VII's hostile environment sexual harassment negligence standard should similarly be applied within the context of Title IX claims of peer sexual harassment in determining whether an educational institution should be held liable under Title IX for failing to stop alleged student-on-student harassment, the *Petaluma* court rejected the plaintiff-student's contention in this regard, agreeing instead with the defendants-school districts that such an aggrieved student must prove an intent on the part of the educational institution to discriminate against the plaintiff on the basis of his or her sex in failing to remedy the harassment in order to prove a violation of Title IX. *Id.* at 1575-76.

In explaining its conclusion that Title VII's hostile environment sexual harassment negligence standard is inapplicable for purposes of determining an educational institution's Title IX liability for its failure to remedy peer sexual harassment, the court in *Petaluma* emphasized a crucial distinction between those Title VII and Title IX hostile environment sexual harassment cases imposing a negligent standard of liability and those Title IX cases premised upon student-to-student hostile environment sexual harassment claims, which requires the imposition of a different standard of fault upon the offending educational institution in Title IX peer sexual harassment cases.

Namely, that in Title VII sexually hostile environment claims, and in Title IX cases such as *Lipsett* and *Patricia H.* where VII's negligence standard was imposed in determining liability, the employer or educational institution's liability under Title VII or Title IX is premised upon agency principles, such that Title VII or IX liability is assessed against an employer or educational institution for its failure to remedy sexual harassment perpetrated by one of its agents against the plaintiff-student or employee, with the chosen standard for imposing such agency liability being one of negligence. *Id.*

Thus, the agent's sexual harassment of the plaintiff-student or employee, which itself constitutes sexual discrimination in violation of Title VII or Title IX, is simply imputed to the employer or educational institution where the employer or institution either knew or should have known of the harassment and still failed to take adequate steps to stop it, such that the employer or educational institution is additionally deemed to have violated Title VII or Title IX in failing to halt the agent's sexual harassment of the plaintiff-student or employee. The offending employer or educational institution consequently is being held liable in these cases under Title VII or IX not for having directly sexually harassed the plaintiff-student or employee, but rather for its negligent failure to stop its agent's violative Title VII or Title IX sexual harassment of the plaintiff. Where a peer hostile environment sexual harassment claim is asserted, however, as in the case now before this Court and as was advanced in *Doe v. Petaluma*, it is a *student* of the educational institution which has committed the sexual harassment at issue, rather than any agent-employee of the defendant institution.

Because students are not agents of educational institutions, the *Petaluma* court reasoned that agency principles cannot be applied within the context of Title IX peer hostile environment sexual harassment claims to impute the student's sexually harassing behavior to the institution and thus impose liability upon the educational institution for sexual discrimination in violation of Title IX based solely upon its negligent failure to remedy the student's harassing behavior. Rather, in order to prevail under Title IX upon a claim of peer hostile environment sexual harassment, the plaintiff-student must allege and prove that the educational institution itself rather than the student directly sexually discriminated against the plaintiff-student in violation of Title IX in failing to stop the alleged student-on-student sexual harassment. *Id.* at 1576.

The *Petaluma* court then determined that the state of mind required for showing a direct violation of Title IX is one of intent, such that an educational institution must have intentionally sexually discriminated against a plaintiff in order to be subjected to liability under Title IX for any injuries suffered by the plaintiff as a result of that discrimination. In support of its conclusion that intentional sexual discrimination is the requisite standard of fault for subjecting an educational institution to liability under Title IX in a non-agency context for a direct violation of Title IX, the court specifically relied upon the United States Supreme Court Title IX decision of *Franklin v. Gwinnett County Public Schools,* 112 S.Ct. 1028 (1992).

The Supreme Court case of *Franklin v. Gwinnett* dealt with a plaintiff-student's private remedy Title IX claim against the educational institution which she attended, in

which the student claimed that the institution had violated Title IX by failing to stop sexual harassment perpetrated by a teacher who was employed by the institution against the plaintiff-student. *Franklin*, 112 S.Ct. at 1031. The district court had previously dismissed and the Eleventh Circuit Court of Appeals had affirmed that court's dismissal of the plaintiff's claim on the basis that Title IX did not allow for private damages claims; the Supreme Court subsequently reversed these decisions, finding for the first time that a private damages remedy is available under Title IX. *Id.* at 1038. Since the Court in *Franklin* had thus allowed the plaintiff-student's private damages Title IX claim to proceed against the defendant-educational institution in that case, the plaintiff-student in *Doe v. Petaluma* cited the *Franklin* decision as direct support for her argument that an educational institution's mere failure to remedy sexual harassment can subject that institution to damages liability under Title IX, such that the school districts in the *Petaluma* case should similarly be subject to liability under Title IX for their negligent failure to halt the student-on-student sexual harassment directed at the plaintiff in that case. *Doe v. Petaluma*, 830 F.Supp. at 1575-76.

The *Petaluma* court, however, rejected the plaintiff-student's contention that the Supreme Court in *Franklin* had adopted a negligence standard for use in ascertaining when an educational institution should be held liable for a direct violation of Title IX, noting instead that the educational institution's liability in *Franklin* appeared to be premised not upon any direct violation by the institution of Title IX but rather solely upon agency principles, such that the Court was merely holding the institution

accountable for the Title IX violations of its agent – the employee-teacher who had sexually harassed the student. *Id.* In terms of the requisite standard of fault on the part of the teacher who had allegedly directly violated Title IX by sexually harassing the plaintiff-student, however, the *Petaluma* court determined that the Supreme Court in *Franklin* had clearly required a finding that the perpetrator had *intentionally* sexually discriminated against the student in order to find an actionable damages violation of Title IX. *Franklin,* 112 S.Ct. at 1037.

Since the Supreme Court in its opinion in *Franklin* thus seemingly required intentional sexual discrimination in order to impose damages liability upon a party for its direct violation of Title IX, as opposed to any Title IX liability which might be imputed to a party through agency principles, the district court in *Doe v. Petaluma* held that intentional sexual discrimination is in fact required in a non-agency context in order to show that an educational institution has directly violated Title IX, such that it is consequently subject to monetary damages for that violation. *Doe v. Petaluma,* 830 F.Supp. at 1576. The *Petaluma* court's decision in this regard is additionally supported by the conclusion of a number of other courts that Title IX prohibits only intentional rather than negligent sexual discrimination, based on the theory that Title IX, like Title VI upon which the enactment of Title IX was premised, was enacted pursuant to Congress' power under the Spending Clause, such that only intentional discrimination is actionable under Title IX since, due to the contractual nature of the funding situation, a recipient of federal funds can only be held accountable for

those wrongful actions which have been clearly delineated and of which the entity had prior notice. *Seamons v. Snow*, 864 F.Supp. at 1117; *Houston v. Mile High Adventist Academy*, 846 F.Supp. 1449, 1457 (D. Colo. 1994); *R.L.R. v. Prague Public Sch. Dist. I-103*, 838 F.Supp. 1526, 1534 (W.D. Okl. 1993).

This Court finds itself in agreement with the *Petaluma* court's determination that at least in a non-agency context, the requisite standard of fault for determining whether an educational institution has directly violated Title IX such that it may be held liable for damages under the Act is that of intentional sexual discrimination. Consequently, although a plaintiff-student may properly assert a student-on-student hostile environment sexual harassment claim under Title IX, in order to show a violation of Title IX by the educational institution due to its failure to remedy the peer sexual harassment directed at the plaintiff-student, the plaintiff must allege and prove that the institution's failure to stop the peer sexual harassment campaign was attributable to an intent on the part of the institution to discriminate against the plaintiff on the basis of his or her sex. The defendant-educational institution cannot be held liable on the basis that it was merely negligent in failing to stop the harassment, since no agency relationship exists between the students perpetrating the sexual harassment and the educational institution.

Thus, although failure on the part of the educational institution to halt the peer sexual harassment campaign can constitute circumstantial evidence on the part of the institution to discriminate against the victimized student

on the basis of sex, the institution's failure alone to remedy the harassment does not constitute intentional sexual discrimination per se in violation of Title IX. While the Defendant University of Illinois in the case at hand then is partially correct in its argument that an educational institution's failure to remedy student-on-student sexual harassment does not in itself *per se* constitute intentional sexual discrimination on the basis of sex which is actionable under Title IX, an educational institution's failure to remedy such peer sexual harassment can at least constitute the basis of a Title IX sexual discrimination claim against the institution where its failure to halt the harassment is motivated by an intent to discriminate against the victimized student on the basis of that student's sex.

In the case at hand, although Plaintiff Jane Doe in Count I of her Complaint has permissibly alleged that the Defendant University of Illinois failed to remedy the student-on-student sexual harassment directed at the Plaintiff, she has inappropriately pleaded that the Defendant's failure in this regard to remedy the peer sexual harassment per se " . . . constitute(d) intentional, willful sexual discrimination in violation of Title IX" (Pls.' Compl. ¶ 96). As explained above, such an allegation cannot constitute the basis of the Plaintiff's Title IX peer sexual harassment claim against the Defendant University; rather, the Plaintiff must allege in Count I of her complaint and ultimately prove that the Defendant's failure to remedy the students' sexual harassment campaign was motivated by an intent on the part of the Defendant University to discriminate against the Plaintiff on the basis of her sex. This Court consequently recommends that Count I of the Plaintiffs' Complaint be dismissed

without prejudice, with leave granted to Plaintiff Jane Doe to replead this crucial allegation.

The Defendant University additionally alleges that it is entitled to the dismissal of Count II of the Plaintiffs' Complaint. In this count, Plaintiff Jane Doe has alleged that the Defendant University is liable under Title IX due to its reckless failure to stop the peer sexual harassment campaign directed at the Plaintiff; the Defendant University argues that dismissal of this claim of reckless discrimination is required on the basis that only intentional sexual discrimination is actionable under Title IX. As already explained at length in this Report and Recommendation, intentional sexual discrimination is indeed required at least in a non-agency context in order to find an educational institution liable under Title IX for its failure to remedy student-on-student sexual harassment, such that Plaintiff Jane Doe's Count II claim of Title IX reckless discrimination should be dismissed with prejudice.

Plaintiff Jane Doe's Count III Section 1983 Claims

In Count III of the Plaintiffs' Complaint, Plaintiff Jane Doe has asserted Section 1983 claims against each of the individual Defendants, which in turn are premised upon the individual Defendants' alleged violations of Title IX and the Equal Protection Clause of Fourteenth Amendment to the United States Constitution in failing to remedy the peer sexual harassment to which the Plaintiff was subjected. (Pls.' Resp. Defs.' Mot. Dismiss p. 8). The individual Defendants, in their Motion to Dismiss Count III of the Plaintiffs' Complaint, argue that they are entitled

to the Rule 12(b)(6) dismissal of Count III on the basis that Plaintiff Jane Doe's Section 1983 claims in this count are subsumed by Title IX, which as explained in the prior section of this Report and Recommendation provides no cause of action against individuals. (Defs.' Mot. Dismiss ¶ 7). After reviewing the applicable case law addressing this question, this Court finds that Title IX does indeed subsume Section 1983 claims which are premised upon the same set of underlying facts as a plaintiff's Title IX cause of action. As Plaintiff Jane Doe's Section 1983 claims are so premised in the case at hand, dismissal of Count III of the Plaintiffs' Complaint with prejudice is required.

In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 101 S.Ct. 2615 (1981), the United States Supreme Court held that where a federal statute provides for its own comprehensive enforcement scheme, a plaintiff may not bypass the requirements of that enforcement scheme by bringing suit directly under 42 U.S.C. § 1983. *Middlesex County Sewerage Auth.*, 101 S.Ct. at 2626. The Third Circuit Court of Appeals, as well as a number of district courts, has concluded that constitutional claims grounded on the same underlying facts as a Title IX claim are "subsumed" within the Title IX claim, on the basis that Title IX establishes a "comprehensive enforcement scheme" within the definition of the *Middlesex County Sewerage Authority* case which cannot be bypassed by bringing an action under Section 1983. *William v. School Dist. of Bethlehem*, 998 F.2d 168, 176 (3rd Cir. 1993), *cert. denied*, 114 S.Ct. 689 (1994); *Pfeiffer v. School Bd. for Marion Ctr. Area*, 917 F.2d 779, 789 (3rd Cir. 1990); *Mennone v. Gordon*, 889 F.Supp. at 58-59; *Ruh v. Samerjan*,

816 F.Supp. at 1331; *Bougher v. Univ. of Pittsburgh*, 713 F.Supp. at 146; *Mabry v. State Bd. of Community Colleges and Occupational Educ.*, 597 F.Supp. at 1239.

This Court agrees with the conclusion reached in the above-cited cases that Title IX provides a comprehensive enforcement scheme which consequently precludes Title IX plaintiffs from bringing any additional Section 1983 causes of action premised upon the same set of underlying facts which form the basis of the plaintiff's Title IX claim. In the case at hand, a review of those Section 1983 claims advanced by Plaintiff Jane Doe in Count III of the Plaintiffs' Complaint reveals that her Section 1983 claims against the individual Defendants are premised upon the identical set of facts which form the basis of her Title IX claim against the Defendant University – namely, the failure of the Defendant University's officials to stop the peer sexual harassment campaign directed toward the Plaintiff – such that Count III of the Plaintiffs' Complaint must be dismissed with prejudice.

Plaintiffs' Count IV Claims Under the Illinois Family Expense Statute

This Court finally addresses the individual Defendants' assertion that Count IV of the Plaintiffs' Complaint, which presents a claim pursuant to the Illinois Family Expense Statute, must also be dismissed with prejudice pursuant to either Federal Rules of Civil Procedure 12(b)(1) or (6). The Defendants first argue that the Plaintiffs' Family Expense Act claim must be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction should this court dismiss those federal claims advanced

by Plaintiff Jane Doe in Counts I, II and III of the Complaint, since a basis will no longer exist for this court to exercise supplemental jurisdiction over this count, and must additionally be dismissed pursuant to Rule 12(b)(6) should the Plaintiff's federal claims be stricken given that Illinois Family Expense Statute claims are derivative rather than independent causes of action. (Defs.' Mot. Dismiss ¶¶ 11-12).

Since this Court has not dismissed each of Plaintiff Jane Doe's federal claims with prejudice but has instead ruled that the Plaintiff can potentially state a Title IX claim for intentional sexual discrimination against the Defendant University in Count I of the Complaint and has in fact granted the Plaintiff leave to replead this count, then so long as Plaintiff Jane Doe is able to replead such a valid cause of action this Court may appropriately exercise supplemental jurisdiction over the Plaintiffs' Count IV Family Expense Statute claim pursuant to 28 U.S.C. § 1367(a), since this cause of action is premised upon the same set of underlying facts as Plaintiff Jane Doe's Count I. Consequently, the individual Defendants' motion to dismiss Count IV on this particular basis must be denied.

Dismissal of Count IV pursuant to Rule 12(b)(6) for failure to state a cause of action, however, is required on the basis that causes of action brought pursuant to the Illinois Family Expense Statute constitute only derivative rather than independent causes of action, and there no longer exists any underlying tort claim for liability against the individual Defendants upon which the Plaintiffs' Family Expense Statute damages claim can be premised. Section 15 of the Illinois Rights of Married Persons

Act, which is commonly referred to as the Illinois Family Expense Statute, allows a parent to maintain a cause of action against a tortfeasor for injuries inflicted upon by the tortfeasor upon the parent's minor child and for which the suing parent has become liable under Section 15. *Graul v. Adrian*, 49 Ill.App.2d 101, 199 N.E.2d 631 (5th Dist. 1963), *aff'd*, 32 Ill.2d 345, 205 N.E.2d 444 (1965). Claims brought under this statutory section are derivative rather than independent in nature, and consequently depend upon the separate establishment of tort or statutory liability on the part of those defendants against whom the Family Expense claim is advanced for the injuries suffered by the minor child, in order for those defendants to be held liable under the Family Expense Statute to the minor child's parents for reimbursement of those expenses incurred by the parents in treating the minor child's injuries. *Boesl v. Suburban Trust and Sav. Bank*, 642 F.Supp. 1503, 1515 (N.D. Ill. 1986) (citing *Brown v. Metzger*, 118 Ill.App.3d 855, 455 N.E.2d 834 (2nd Dist. 1983), *aff'd*, 104 Ill.2d 30, 470 N.E.2d 302 (1984)).

Thus, those defendants from whom reimbursement expenses are sought under the Illinois Family Expense Statute are only liable to an injured minor child's parents pursuant to the Statute for such expenses to the same extent as which they are proven liable under a separate tort or statutory theory for the injuries suffered by the minor child. *Id.* In the case at hand, the Plaintiffs' have voluntarily withdrawn their Family Expense claim against the Defendant University of Illinois, such that the Plaintiffs' seek reimbursement in Count IV from only the individual Defendants. As explained above, given the derivative nature of the Illinois Family Expense Statute,

in order for the Plaintiffs to maintain an actionable claim against these individual Defendants under the Statute, they must establish a separate basis of tort or statutory liability on the part of the individual Defendants for Plaintiff Jane Doe's injuries.

This Court in this Report and Recommendation, however, has already determined that Counts I, II and III of the Plaintiffs' Complaint which advance statutory claims of liability against the individual Defendants for Plaintiff Jane Doe's injuries, must be dismissed with prejudice, such that there is no longer any underlying claim advanced against the individual Defendants in the Plaintiffs' Complaint asserting liability on the part of these Defendants for Jane's injuries. Since there no longer exists any underlying statutory or tort theory of liability upon which the plaintiffs' derivative Family Expense Statute claim may be premised, Plaintiffs' Count IV Illinois Family Expense Statute claim must be dismissed with prejudice pursuant to Rule 12(b)(6) for failure to state a cause of action.

Summary

The parties are advised that any objection to this recommendation must be filed in writing with the Clerk within ten (10) working days after service of this recommendation. *See* 28 U.S.C. § 636(b)(1). Failure to object will constitute a waiver of objections on appeal. *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538 (7th Cir. 1986).

ENTER this 22 day of January, 1996.

/s/ David G. Bernthal
DAVID G. BERNTHAL
U.S. MAGISTRATE JUDGE

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 14, 1998

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. TERENCE T. EVANS, Circuit Judge

JANE DOE, a minor, JOHN DOE, individually and as father and next friend of Jane Doe, and JANET DOE, individually and as mother and next friend of Jane Doe.	)	Appeals from the United States District Court for the Central District of Illinois
Plaintiffs-Appellees,	)	No. 96-1129
UNITED STATES OF AMERICA,	)	
Intervening Appellee,	)	
No. 96-3511 *v.*	)	
UNIVERSITY OF ILLINOIS, a public corporation,	)	
Defendant-Appellant.	)	

JANE DOE, a minor, JOHN DOE, individually and as father and next friend of Jane Doe, and JANET DOE, individually and as mother and next friend of Jane Doe.

Plaintiffs-Appellants,

v.

UNIVERSITY OF ILLINOIS, a public corporation,

Defendant-Appellee.

Michael M. Mihm,
Chief Judge

Nos. 96-3511 and 96-4148

ORDER

On consideration of the petition for rehearing with suggestion of rehearing en banc filed by the University of Illinois on March 30, 1998, all of the judges on the panel have voted to deny rehearing and no judge in active service has requested a vote on the suggestion for rehearing en banc. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

U.S.C. Const. Art. I § 8, cl. 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

U.S.C. Const. Amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C. Const. Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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20 U.S.C. § 1681

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only

students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices –

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to –

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for –

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in

comparison with the total number of percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

NOTICES

DEPARTMENT OF EDUCATION

Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties

Thursday, March 13, 1997

ACTION: Final policy guidance.

* * *

Liability of a School for Peer or Third Party Harassment[27]

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[27] The overwhelming majority of courts that have considered the issue of sexually hostile environments caused by peers have indicated that schools may be liable under Title IX for their knowing failure to take appropriate actions to remedy the hostile environment. See note 7 and peer hostile environment cases cited in note 3. However, one Federal Circuit Court of Appeals decision, *Rowinsky v. Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996), cert. denied, 117 S.Ct. 165 (1996), has held to the contrary. In that case, over a strong dissent, the court rejected the authority of other Federal courts and OCR's longstanding construction of Title IX and held that a school district is not liable under Title IX for peer harassment unless "the school district itself directly discriminated based on sex," i.e., the school responded differently to sexual harassment or similar claims of girls versus boys. For cases specifically rejecting the *Rowinsky* interpretation, see e.g., *Doe v. Petaluma*, Plaintiff's Motion for Reconsideration Granted, 1996 WL 432298 *6 (N.D. Cal. 1996); *Burrow v. Postville Community School Dist.*, 929 F.Supp. at 1193.

OCR believes that the *Rowinsky* decision misinterprets Title IX. As explained in this Guidance, Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to take immediate and appropriate steps to remedy the hostile environment once a school official knows about it. If a student is sexually harassed by a fellow student, and a school official knows about it, but

In contrast to the variety of situations in which a school may be liable for sexual harassment by its employees, a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[28] (Each of these factors is

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does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination. Notably, Title VII cases that hold that employers are responsible for remedying hostile environment harassment of one worker by a co-worker apply this same standard. See, e.g., *Ellison v. Brady*, 924 F.2d at 881-82; *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Snell v. Suffolk*, 782 F.2d 1094 (2nd Cir. 1986); *Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486 (M.D. Fla. 1991).

Language in subsequent decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. However, the existence of Fifth Circuit decisions that are inconsistent with OCR policy does not prohibit schools in these States from following the Guidance. In order to ensure students a safe and nondiscriminatory educational environment, the better practice is for these schools to follow the Guidance. Thus, schools should take prompt corrective action to address peer harassment of which they knew or should have known. Indeed, following the Guidance may be the safest way for schools in these States to ensure compliance with the requirements of Title IX.

[28] See Restatement (Second) of Agency §219(2)(b).

discussed in detail in subsequent sections of the Guidance.) Under these circumstances, a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

* * *

Effect of Grievance Procedures on Liability

Schools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment, and to disseminate a policy against sex discrimination.[31] (These issues are discussed in the section on "Prompt and Equitable Grievance Procedures.") These procedures provide a school with a mechanism for discovering sexual harassment as early as possible and for effectively correcting problems, as required by Title IX. By having a strong policy against sex discrimination and accessible, effective, and fairly applied grievance procedures, a school is telling its students that it does not tolerate

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[31] 34 CFR 106.8(b) and 106.9.

sexual harassment and that students can report it without fear of adverse consequences.

Accordingly, in the absence of effective policies and grievance procedures, if the alleged harassment was sufficiently severe, persistent, or pervasive to create a hostile environment, a school will be in violation of Title IX because of the existence of a hostile environment, even if the school was not aware of the harassment and thus failed to remedy it.[32] This is because, without a policy and procedure, a student does not know either of the school's interest in preventing this form of discrimination or how to report harassment so that it can be remedied. Moreover, under the agency principles previously discussed, a school's failure to implement effective policies and procedures against discrimination may create apparent authority for school employees to harass students.[33]

OCR Case Resolution

If OCR is asked to investigate or otherwise resolve incidents of sexual harassment of students, including incidents caused by employees, other students, or third

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[32] See Racial Harassment Investigative Guidance, 59 FR 11450; *Murray*, 57 F.3d at 249 (an employer is liable for the harassment of co-workers if the employer "either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it".

[33] EEOC Policy Guidance at p. 25 (" * * * in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.")

parties, OCR will consider whether – (1) the school has a policy prohibiting sex discrimination under Title IX and effective Title IX grievance procedures;[34] (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and appropriate corrective action responsive to quid pro quo or hostile environment harassment. (Issues related to appropriate investigative and corrective actions are discussed in detail in the section on "Recipient's Response.") If the school has taken each of these steps, OCR will consider the case against the school resolved and take no further action other than monitoring compliance with any agreement between the school and OCR. This is true in cases in which the school was in violation of Title IX, as well as those in which there has been no violation of Title IX.[35]

* * *

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[34] 34 CFR 106.8(b).

[35] If OCR finds a violation of Title IX, it will seek to obtain an agreement with the school to voluntarily correct the violation. The agreement will set out the specific steps the school will take and provide for monitoring by OCR to ensure that the school complies with the agreement. Schools should note that the Supreme Court has held that monetary damages are available as a remedy in private lawsuits brought to redress violations of Title IX. *Franklin*, 503 U.S. at 76. Of course, a school's immediate and appropriate remedial actions are relevant in determining the nature and extent of the damages suffered by a plaintiff.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JANE DOE, a minor, by JOHN DOE, individually and as father and next friend, and JANET DOE, individually and as mother and next friend,	)	
Plaintiffs,	)	
vs.	)	No.
UNIVERSITY OF ILLINOIS, a public corporation; ALICE DEAN DAVIS-SMITH, an individual; JOEL CRAMES, an individual; HENRY MEARES, an individual; BARBARA L. WYSOCKI, an individual; WILLIAM R. SUTTON, an individual; THEODORE L. BROWN, an individual; SUSAN T. GONZO, an individual; and LARRY R. FAULKNER, an individual,	)	JURY DEMAND
Defendants.	)	

COMPLAINT

(Filed May 24, 1995)

Plaintiff JANE DOE, a minor, by JOHN DOE, individually and as father and next friend, and JANET DOE, individually and as mother and next friend, by their attorneys, Francis J. McConnell, Michael S. Mendelson, and Sheryl L. Jaffee of McConnell & Mendelson, complain as follows against defendants UNIVERSITY OF

ILLINOIS, ALICE DEAN DAVIS-SMITH, JOEL CRAMES, HENRY MEARES, BARBARA L. WYSOCKI, WILLIAM R. SUTTON, THEODORE L. BROWN, SUSAN T. GONZO, and LARRY R. FAULKNER:

Introduction

1. In May 1994, fifteen year-old Jane Doe was driven from University High School in Urbana, Illinois because of the severity of the sexual harassment she was forced to endure for seventeen months. The harassment was perpetrated by her fellow students and, with intentional or reckless indifference, was condoned by University High School and University of Illinois counselors, teachers, and administrators. Despite Jane's and her parents' repeated pleas for help and protection, University High School and the University of Illinois, which governs the high school, refused to intervene. When they finally took action, their inappropriate and untimely disciplinary measures caused hostile and pervasive retaliation which eventually caused Jane to withdraw from school and leave town.

Parties

2. Plaintiff Jane Doe ("Jane") is a female minor. She was born on May 7, 1979 and resides in Champaign, Illinois. She currently attends a private school out of state.

3. Plaintiff John Doe ("Mr. Doe") is Jane's father. He resides in Champaign, Illinois.

4. Plaintiff Janet Doe ("Mrs. Doe") is Jane's mother. She resides in Champaign, Illinois.

5. Defendant University of Illinois ("U of I") is a public corporation which has campuses in Champaign-Urbana, Illinois and Chicago, Illinois. U of I is a public institution of higher education which receives federal financial assistance within the meaning of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"). Both U of I campuses are governed by the University of Illinois Board of Trustees. U of I is responsible for overseeing University High School in Urbana, Illinois ("Uni High").

6. Defendant Alice Dean Davis-Smith, at all times mentioned herein, was an individual working as an employee and agent of U of I as a counselor at Uni High. Plaintiffs sue Davis-Smith in her individual capacity.

7. Defendant Joel Crames, at all times mentioned herein, was an individual working as an employee and agent of U of I as Assistant Director of Uni High. Plaintiffs sue Crames in his individual capacity.

8. Defendant Henry Meares, at all times mentioned herein, was an individual working as an employee and agent of U of I as Principal of Uni High. Plaintiffs sue Meares in his individual capacity.

9. Defendant Barbara L. Wysocki, at all times mentioned herein, was an individual working as en employee and agent of U of I as Interim Principal of Uni High. Plaintiffs sue Wysocki in her individual capacity.

10. Defendant William R. Sutton, at all times mentioned herein, was an individual working as an employee

and agent of U of I as a teacher or auxiliary counselor at Uni High. Plaintiffs sue Sutton in his individual capacity.

11. Defendant Theodore L. Brown, at all times mentioned herein, was an individual working as an employee and agent of U of I as Interim Vice Chancellor. Plaintiffs sue Brown in his individual capacity.

12. Defendant Susan T. Gonzo, at all times mentioned herein, was an individual working as an employee and agent of U of I as liaison between U of I and Uni High. Plaintiffs sue Gonzo in her individual capacity.

13. Defendant Larry R. Faulkner, at all times mentioned herein, was an individual working as an employee and agent of U of I as Provost and Vice Chancellor for Academic Affairs. Plaintiffs sue Faulkner in his individual capacity.

Jurisdiction and Venue

14. This Court has jurisdiction to hear Counts I, II, and III pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), Title IX, and 28 U.S.C. § 1983, because these counts arise under Acts of Congress providing for the protection of civil rights.

15. This Court has jurisdiction to hear Count IV – a claim under the Illinois Family Expense Act, 750 ILCS 65/15 – pursuant to 28 U.S.C § 1367(a), because this claim is so related to the federal claims that they form part of the same case or controversy under Article III of the U.S. Constitution.

16. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

Foreword

17. Jane is currently a sixteen-year-old girl, and a member of the class Title IX was intended to protect. Jane was a student at University High School in Urbana, Illinois ("Uni High") for two school years, from about August, 1992 through May, 1994.

18. Uni High is a public school for academically gifted children which is affiliated with defendant U of I. Uni High's principal reports to the Provost and Vice Chancellor for Academic Affairs at U of I; the Provost reports to the Chancellor; the Chancellor reports to the President; and the President reports to the Board of Trustees. U of I owns and maintains the Uni High building and is responsible for overseeing the Uni High operations.

19. For approximately seventeen months, from about January, 1993 through about May, 1994, Jane was repeatedly subjected to unwelcome sexual harassment by her Uni High peers including, but not limited to, unwelcome sexual advances, intimidation, lascivious verbal and physical conduct, insults, and ridicule of a sexual nature, which causes an intimidating, hostile, offensive, and abusive school environment in violation of Title IX.

Facts

20. On a school day in November, 1992, during school hours on school property, M[1] repeatedly pulled

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[1] This complaint will not use full names of minors to protect their identities. Such minors were, at all times mentioned herein, Uni High students.

thirteen year old Jane onto his lap and, despite her struggle, unzipped her jeans in front of several other students.

21. In December, 1992, Jane went to lunch with a group of students which included M., a star basketball player at Uni High. At the restaurant, M. slipped both hands into Jane's sweater and grabbed her breasts. Later that month, while M and Jane waited at the bus stop, M tried to force his hand into her pants.

22. On or about January 2, 1993, M. invited Jane to his home in the guise of a group gathering of Uni High students. When she arrived, no other students were there besides M. He led Jane to his bedroom and sexually assaulted her.

23. On or about January 21, 1993, Jane told her parents that M. had sexually assaulted her and that he continued inappropriate sexual advances during school hours on school property. Mr. and Mrs. Doe confronted M.'s parents, who denied the incident.

24. M. told his friends that Jane had ratted on him. This precipitated a campaign of sexual harassment by a group of boys who called themselves the "posse," which campaign lasted for the duration of Jane's schooling at Uni High.

25. M. and his friends wrote comments about Jane on desks which declared "Jane is good in bed," "Jane has a good chest," "Jane is a slut," "Jane is a whore," "Jane is a bitch."

26. On information and belief, M., T., and B. drew exaggerated pictures of naked female torsos on desks and wrote Jane's middle name, "Orlando," under them. A Uni

High English teacher once showed the desks to Assistant Director Joel Crames ("Crames"). Crames said he had no way to prove who had drawn the pictures and washed the desks. Jane was subsequently reprimanded for "looking for trouble," and the burden was placed on her to document the harassment.

27. M.'s, T.'s, and B.'s fathers were, at all relevant times, U of I professors or administrators. U of I's Provost and Vice Chancellor for Academic Affairs, Larry R. Faulkner, is a long-time friend of B.'s family.

28. As Jane walked through the Uni High hallways, she often heard boys speaking about her: One boy would ask, "I'm not a slut, are you a slut?" Another boy would respond, "No, I'm not a slut, are you a slut?" until they both broke into laughter.

29. Uni High boys spit on Jane and taunted her. B. exposed his genitals to Jane, as well as other students.

30. Jane tried in vain to avoid any speech or action which would draw attention to herself and perpetrate the harassment. She grew reluctant to participate in class discussions and had difficulty concentrating. No matter what Jane said or did, her fellow Uni High students found a way to ridicule, degrade, and humiliate her. For example, one day, Jane wore a pair of green jeans to school. The teacher asked "what is a way to get a sexually transmitted disease?" A Uni High student answered "by wearing green jeans."

31. On February 15, 1993, Jane began seeing a psychologist weekly.

32. In late February, Jane informed Principal Henry Meares ("Meares") about the harassment. Meares offered words of encouragement which led Jane to believe that Meares would protect her. He did not inform Jane of her rights under Title IX or notify her of any designated school official who was responsible for investigating her complaints, as required by 34 CFR § 106.8(a). Uni High neither designated nor informed the Does of such an official until January, 1994.

33. In March, 1993, Mr. Doe informed Meares of the extent of the harassment Jane was enduring at Uni High. Meares acknowledged the problem and promised to remedy the situation. He did not tell Mr. And Mrs. Doe about Jane's rights under Title IX. His solution was to detain Jane's class after an all-school assembly and threaten to expel them if their misbehavior continued. Jane's classmates openly blamed her for the "lecture."

34. On or about March 22, 1993, Jane was summoned by the school counselor, Alice Dean Davis-Smith ("Davis-Smith"). She discussed Jane's frequent complaints of harassment and asked if people ever called Jane a "know-it-all-bitch." She did not inform Jane of her rights under Title IX.

35. On or about April 15, 1993, Mrs. Doe informed Davis-Smith of the assaults and the extent of the harassment. Davis-Smith blamed Jane.

36. Mr. Doe Spoke with Meares at least once a month during April, May, and June regarding the sexual harassment campaign against Jane. Meares did nothing.

37. On or about May 20, 1993, Mrs. Doe spoke to Davis-Smith on the telephone. Davis-Smith dismissed the sexual harassment as "a Jane problem" and told Mrs. Doe "it is Jane who has to change." Even though she blamed Jane, Davis-Smith assured Mrs. Doe that Uni High rules and regulations would be more strictly enforced the following year.

38. On May 21, 1993, Mr. and Mrs. Doe wrote Davis-Smith a letter which detailed the assaults and the harassment. Davis-Smith sent it back with no comment.

39. Throughout April and May, 1993, Jane reported many incidents of sexual harassment to Crames as well as the counseling office. Crames advised Jane to document the incidents of harassment in writing. He did not inform her of her rights under Title IX.

40. On or about June 4, 1993, Mr. Doe met with Meares and requested to see the Uni High rules and handbook. The most recent handbook Uni High had distributed to students and parents was from the 1990-91 school year. The handbook did not provide a grievance procedure for sexual harassment claims, despite Uni High's duty to adopt and publish grievance procedures which provide for prompt and equitable resolution of student complaints under Title IX. *See* 34 CFR § 106.8-.9. No Uni High handbook had been published or distributed to students or parents during the 1991-1992 or 1992-1993 school years.

41. On or about June 23, 1993, Mr. and Mrs. Doe met with Meares to express concern about Jane's return to Uni High the following school year and requested that Meares take appropriate remedial measures to curtail the

harassment. Meares admitted that Uni High had no sexual harassment policy and offered no remedies.

42. Frustrated with administrators' deliberate indifference to their daughter's plight, and having exhausted the chain of command an Uni High, on or about July 2, 1993, Mr. and Mrs. Doe met with U of I Interim Vice Chancellor Ted Brown ("Brown") to report the harassment and appeal for help.

43. On July 12, 1993, Brown wrote Mr. and Mrs. Doe a letter which stated in relevant part:

> Henry [Meares] indicated to me that he is taking several steps that are related to your daughter's experiences. He is at work on a written sexual harassment policy, which will be put into place this fall. That policy will receive a thorough airing with the students, so that there is no lack of clarity about what it means. . . . I am convinced that Henry intends to increase his efforts to create the most supportive atmosphere possible for learning and development at University High school. I believe that all these actions taken together will go a long way toward improving the climate at the school during the coming year. . . . [W]e cannot expect that all the perceived problems will go away immediately.

Brown did not inform the Does of Jane's rights under Title IX. neither Meares nor Brown followed through with the steps articulated in Brown's letter.

44. On or about July 14, 1993, Mr. and Mrs. Doe met with University of Illinois police captain Kris Fitzpatrick ("Fitzpatrick") and U of I administrator Mary Ellen

O'Shaughnessey ("O'Shaughnessey"). Two days earlier, Mrs. Doe had sent them seventeen pages detailing the assaults and the harassment at Uni High.

45. In or about August, 1993, Fitzpatrick and O'Shaughnessey interviewed Jane. Mr. and Mrs. Doe then submitted a list of goals to improve the environment at Uni High. O'Shaughnessey assured Jane that remedial measures would be instituted and students would be held accountable for their actions. As Crames had done, O'Shaughnessey advised Jane to record and report any incidents of harassment. Jane continued to do so until she grew weary of the constant retaliation which such reports continued to incite.

46. Jane returned to Uni High for the 1993-1994 school year in reliance upon U of I and Uni High officials' assurances to her, her parents, and her psychologist, that appropriate action would be taken to remedy the harassment. Despite these promises, the harassment continued.

47. During the first week of the new school year, Crames spoke to the Uni High students at an all-school assembly. He reported the "trouble" he had with legal personnel and that he was now required to distribute a new handbook. The students groaned. He read the list of prohibited sexual harassment behaviors in a mocking manner which elicited laughter from the students.

48. In September, 1993, the Uni High Parent Faculty Organization approved distribution of handbooks which specifically addressed sexual harassment. The handbooks were not distributed to students until May, 1994 – eight months later – when the harassment had already grown

so vicious and intolerable that Jane was forced to withdraw from school and leave town.

49. M. did not return to Uni High for the 1993-94 school year. M.'s friends blamed Jane for his decision not to return to Uni High and were angry because they had lost one of their star basketball players.

50. During Fall, 1993, M.'s friends, especially B. and T., continued to openly harass fourteen year old Jane. They ridiculed her to such an extent that she refrained from participating in class discussions.

51. Jane's middle name, "Orlando," was often used in the harassment. During one class, a teacher asked one of the boys where he had gone on vacation. The boy replied "Orlando." The teacher asked him what it was like in Orlando. The boy replied "warm and moist." The students laughed at Jane.

52. B. and his friends kept a point system whereby they rated female students' anatomy and clothing. Female students were asked to turn around so the boys could get a better look. If a female student participated in class or if she cooperated with the teacher, she lost points. At the end of class, the point tallies were announced. Jane once showed the list to a Biology teacher. The teacher did nothing.

53. During Fall, 1993, a Uni High student names S. sat in front of Jane every day during Latin class. Throughout class, S. reached behind him and stroked Jane's legs and tried to force his hand up her skirt. Jane moved her chair backwards to evade S.'s probing hands until she was against the back wall of the classroom.

When Jane changed seats to escape from S., he sat in front of her and continued his inappropriate and unwanted sexual advances.

54. As Crames and O'Shaughnessey had advised, Jane continued to inform Meares of incidents of sexual harassment. Meares did nothing.

55. Rumors spread that the Does had filed a lawsuit against Uni High. A student named A. taunted Jane with chants of "lawsuit, lawsuit, lawsuit" during class.

56. In or about October, 1993, Meares suddenly left town and an interim principal, Barbara Wysocki ("Wysocki"), was appointed by Brown.

57. In November, 1993, B. and T. began taunting the president of Jane's class, Jane's best friend E, an African-American girl. The students called her "whore" and "slut" and sang songs to her in the same regard. When Jane publicly defended E., the harassment against Jane escalated.

58. B. and his friends called Jane "whore," "slut," and a "racist" with racist parents. They stared coldly at Jane and ridiculed her and other female students for participating in class discussions.

59. B. showed Jane graphic pictures of naked women. He frequently disrupted classes with vulgar sexual gestures like grabbing his crotch while licking his lips. He exposed his buttocks to students during class.

60. On January 21, 1994, Mr. and Mrs. Doe requested and attended a meeting with Wysocki and informed her of the assaults and the harassment campaign against their daughter. According to Wysocki, she

had not been informed about the harassment by any Uni High or U of I officials. At the Does' request, Wysocki checked to see what records had been kept regarding the incidents; she found no written documentation.

61. At the January 21, meeting, Wysocki informed the Does that U of I legal counsel was in the process of reviewing a proposed sexual harassment policy and procedure, and that Uni High's history teacher, William R. Sutton ("Sutton"), had been appointed "intake person" for all sexual harassment complaints. Wysocki advised the Does to file a complaint with Sutton. Since the Does are in the midst of complaint procedures implemented by O'Shaughnessey, the Does did not file a new complaint with Sutton at that time. O'Shaughnessey had assured the Does that she would address the problem.

62. On or about January 22, 1994, Jane, E., and another student named R. compiled a list of incidents of harassment which they provided to O'Shaughnessey.

63. O'Shaughnessey implemented investigation procedures. On or about January 26, 1994, O'Shaughnessey and U of I police official Vicki Hawley interviewed approximately seventeen Uni High students. Most of Jane's and E.'s accounts of the hostile environment at Uni High were corroborated. Although O'Shaughnessey forwarded the results of the investigation to Wysocki on January 26, 1994, they were never published.

64. During the investigation, Jane and E. expressed concern about retaliation. Crames assured them he would protect them.

65. Students blamed Jane and E. for the investigation and immediately retaliated against them. They called them "bitches" and told Jane that all the problems at Uni were her fault. They said Jane should be killed. They proclaimed "Save B. and T. from Jane's lies!" Students discussed the idea of pooling their money and purchasing a gun to kill Jane and E.

66. Jane, E., and R. went to Crames to seek the protection he had promised. Crames told them to "separate the wheat from the chaff" and to start acting like "normal females." He chastised them for skipping class and rebuffed their repeated requests for information about the status of the investigation. He scolded them for making allegations which could adversely affect B.'s and T.'s futures.

67. When Mrs. Doe visited Uni High to check on Jane on the second day of the investigation, Wysocki told her to leave the building immediately.

68. B. and T. were suspended for ten days. The other students who participated in the harassment campaign were not disciplined.

69. On or about February 3, 1994, Mrs. Doe called Susan Gonzo ("Gonzo"), the liaison between the U of I and Uni High. Gonzo acknowledged that since July, 1993, she had known about the sexual harassment existing at Uni High. Despite this knowledge, Gonzo had never taken any action to implement remedial measures to curtail the harassment. Gonzo did not inform Mrs. Doe of Jane's rights under Title IX.

70. On or about February 4, 1994, Wysocki spoke to Jane's freshmen class. She referred to the harassment as "unfortunate" and informed the students that T. and B. were returning to school. The students were encouraged to respond to Wysocki's speech. They blamed Jane and E. for the lecture.

71. On February 4-5, 1994, Mrs. Doe wrote Wysocki a ten-page letter which detailed the extent of the harassment and expressed concern about the retaliation after B.'s and T.'s suspension.

72. On February 14, 1994, Mrs. Doe attended parent-teacher conferences. Jane's Latin teacher told Mrs. Doe that Jane's performance was substandard, that she was not concentrating, that she had performed poorly on a test and even worse on the makeup test. The teacher was unsympathetic to Jane's plight.

73. On or about February 15, 1994, at Mr. and Mrs. Doe's request, B. was transferred out of Jane's biology class prior to the unit on sex education. B. blamed Jane, called her "bitch," "slut," and "whore," and informed students that Jane was the problem and she should be moved out of class instead of him.

74. Students scrawled threatening messages on desks: "Death to Orlando" (Jane's middle name). Mrs. Doe reported the threats to Carmes and Wysocki. They did nothing.

75. On or about February 23, 1994, Mrs. Doe called Gonzo to inform her that the harassment had not ceased and specifically about the threats. Gonzo responded that if students were told not to write on desks, they would

write on lockers or walls. She offered no assistance and indicated that Mrs. Doe should be satisfied with the school's efforts because two boys had been suspended.

76. On or about February 25, 1994, Sutton was assigned to work with the students as Uni High's auxiliary "counselor." Uni High announced Sutton's new status to the students in a school newspaper article entitled "Junior Class Loses History Teacher." Jane and E. were blamed for this decision.

77. The February 25, 1994 issue of the Uni High newspaper, the *Gargoyle*, reports Wysocki having said that some people "are more thick-skinned to insults than are others, but today's society seems to [be] becoming almost 'too sensitive'."

78. Mrs. Doe repeatedly attempted to contact Sutton to discuss the continuing harassment. Sutton first ignored her messages, then refused to speak with her.

79. In March, 1994, B. continued to taunt Jane and E. and swear at them. He yelled down the hall at Jane between classes, calling her "asshole" and "mother fucking bitch." He called E. a "sterile mulatto."

80. On March 14, 1994, Mr. and Mrs. Doe wrote letters to numerous officials to seek help and protection for their daughter which they were not receiving from Uni High, including Larry Faulkner, U of I Vice Chancellor for Academic Affairs. Their letters and pleas for help were ignored.

81. On or about March 22, 1994, Jane told Sutton she wanted to file a formal complaint against B. Sutton stated

"I strongly advise you not to do this" and refused to take the complaint.

82. On March 22, 1994, Mr. Doe wrote a letter to Sutton pleading with him to protect Jane and E. from B.'s continuing harassment and intimidation. Sutton replied that it was "disturbing . . . to see this nastiness erupting again." He stated that while he did not personally have the power or the inclination to discipline students, he promised to take all efforts to eradicate harassment at Uni High.

83. Since Sutton claimed he had no authority to discipline B., Mr. Doe forwarded to Wysocki a copy of his March 22 letter to Sutton, as well as Sutton's response, on March 23, 1994.

84. On or about March 23, 1994, Jane told Wysocki she wanted to file a formal complaint against B. Jane informed Wysocki that B. had violated numerous rules in the Uni High handbook while on probation after his suspension. Sutton intervened in the meeting and informed her that the boys who had been harassing her had a good reason for not liking her. Sutton advised her to meet with the boys and dissuaded her from filing the complaint. Jane was so traumatized by this meeting that she could not attend school the following day.

85. Mr. and Mrs. Doe repeatedly attempted to contact Wysocki to find out why Jane was prevented from filing a complaint. Wysocki did not return their calls.

86. On March 29, 1994, Jane, accompanied by her mother, filed a formal complaint with Sutton.

87. On or about April 6, 1994, Mrs. Doe met with Wysocki, Gonzo, and U of I Ombudsperson Jacque Bowman ("Bowman") to discuss the continuing harassment and retaliation against Jane. Bowman reported that Jane had filed a complaint. Wysocki blamed and criticized Jane. Jane's March 29 complaint was never investigated by Uni High or U of I officials. No one interviewed E., Jane's primary witness to the harassment. No one informed the Does that they could appeal. The Does grew more and more disillusioned.

88. During the second week of May, 1994, Uni High students wrote obscene and hateful comments about Jane in other students' yearbooks. They defaced Jane's and E.'s pictures. They newly elected class president vowed to "drive Orlando out of school" the following year. Students wrote that E. was a "penis." One student wrote in E.'s yearbook "I like your lips . . . both major and minor."

89. On or about May 17, 1994, when Jane's English group performed a skit in class, B. was allowed to videotape it. 'On the tape he said "zooooooming in" and focused the camera on Jane's crotch. The teacher showed the tape in Jane's and another class. The students laughed. Jane was humiliated. Jane played the tape for Wysocki, who said B.'s behavior was wrong, but did nothing about it.

90. On or about May 24, 1995, Mr. and Mrs. Doe met with O'Shaughnessey, Bowman, Wysocki, Sutton, and Audrey Wells, the Uni High faculty sponsor for the freshman class. The Does reviewed the past and focused on

the future and the potential for implementation of remedial measures which could allow Jane to continue to attend Uni High and stay in the community. The U of I officials in attendance were neither supportive nor encouraging. No one informed the Does of Jane's rights under Title IX.

91. The Does felt they had no choice but to remove Jane from Uni High after the 1993-94 school year. After her last final exam on May 25, 1994, Jane left Uni High for the last time. She was accepted to a private, out-of-state school on June 13, 1994.

Count I

Intentional Sexual Discrimination in
Violation of Title IX, 20 U.S.C. § 1681 *et seq.*
(Against All Defendants)

92. Plaintiffs reallege paragraphs 1-91.

93. The unwelcome sexual harassment referred to in the above paragraphs was severe and pervasive and thus created an abusive and hostile educational environment which made Jane's life at Uni High intolerable.

94. Beginning in or about February, 1993, Jane and her parents repeatedly informed Uni High and U of I officials verbally and in writing, about the pattern of overt and sexually suggestive verbal and physical acts Jane was forced to endure on a daily basis. Jane repeatedly asked for their help and protection and stated that she was the victim of sexual harassment.

95. Uni High and U of I officials, including, but not limited to, defendants refused to take any action to help

and protect Jane, failed to inform Jane of her rights under Title IX, and repeatedly promised they would implement prompt and appropriate remedial action to help and protect Jane and to put an end to the unwelcome sexual harassment that was occurring within Uni High's walls. Despite defendants' repeated promises, they each intentionally discriminated against Jane by failing to inform her or her parents of her rights under Title IX and failing to implement prompt and appropriate remedial action to protect her rights under Title IX.

96. Defendants' intentional indifference to Jane's claims, and their failure to implement prompt and appropriate remedial action to stop the unwelcome sexual harassment despite their knowledge of and repeated promises to remedy such harassment, denied Jane's right to a non-hostile school environment and constitutes intentional, wilful sexual discrimination in violation of Title IX.

97. The unwelcome sexual harassment was severe and pervasive during the Spring semester of 1993 and throughout the entire 1993-1994 school year.

98. As a result of defendants' intentional, wilful sexual discrimination in violation of Title IX, Jane has suffered and will continue to suffer severe mental and emotional distress, including, but not limited to, depression, fear, anxiety, inability to concentrate at school, manifestation of suicidal tendencies, signs of post-traumatic stress disorder, and injury to her reputation. Jane has undergone and continues to undergo psychiatric and psychological treatment and has incurred and continues to incur medical expenses.

99. As a result of defendants' intentional sexual discrimination in violation of Title IX, Jane was unable to finish her schooling at Uni High. She was compelled to leave town and pursue her education at an out-of-state private school to escape the hostile environment of Uni High and the damage to her reputation in the community, yet to obtain an education equal to that offered by Uni High. As a result, Jane and her parents have incurred expenses for tuition and travel to attend an out-of-state private school.

WHEREFORE, plaintiffs respectfully request relief as set forth below.

Count II

Reckless Sexual Discrimination in
Violation of Title IX, 20 U.S.C. § 1681 *et seq.*
(Against All Defendants)

100. Plaintiffs reallege paragraphs 1-94.

101. Uni High and U of I officials, including, but not limited to, defendants, refused to take any action to help and protect Jane, failed to inform Jane of her rights under Title IX, and repeatedly promised they would implement prompt and appropriate remedial action to help and protect Jane and to put an end to the unwelcome sexual harassment that was occurring within Uni High's walls. Despite defendants repeated promises, they each recklessly discriminated against Jane by failing to inform her or her parents of her rights under Title IX and failing to implement prompt and appropriate remedial action to protect her rights under Title IX.

102. Defendants' reckless indifference to Jane's claims, and failure to implement prompt and appropriate remedial action to stop the unwelcome sexual harassment despite their knowledge of and repeated promises to remedy such harassment, denied Jane's right to a non-hostile school environment and constitutes sexual discrimination in violation of Title IX.

103. The unwelcome sexual harassment was severe and pervasive during the Spring semester of 1993 and throughout the entire 1993-1994 school year.

104. As a result of defendants' sexual discrimination in violation of Title IX, Jane has suffered and will continue to suffer severe mental and emotional distress, including, but not limited to, depression, fear, anxiety, inability to concentrate at school, manifestation of suicidal tendencies, signs of post-traumatic stress disorder, and injury to her reputation. Jane has undergone and continues to undergo psychiatric and psychological treatment and has incurred and continues to incur medical expenses.

105. As a result of defendants' sexual discrimination in violation of Title IX, Jane was unable to finish her schooling at Uni High and was compelled to leave town and pursue her education at an out-of-state private school to escape the hostile environment of Uni High and the damage to her reputation in the community, yet to obtain an education equal to that offered by Uni High. As a result, Jane and her parents have incurred expenses for tuition and travel to attend an out-of-state private school.

WHEREFORE, plaintiffs respectfully request relief as set forth below.

Count III

Violation of 42 U.S.C. § 1983
(Against All Defendants, Individually, Except University of Illinois)

106. Plaintiffs reallege paragraphs 1 through 105. In committing all of the acts and omissions alleged herein, defendants were acting under color of state law.

107. All defendants had a duty to provide and ensure an educational environment for Jane free from sexual innuendo, intimidation, and discriminatory animus and to protect Jane and other female students from acts of sexual abuse, including, but not limited to, bias and discrimination. Defendants showed deliberate indifference to Jane in the face of seventeen months of complaints regarding sexual harassment.

108. The failure of defendants, as policy-making and policy-implementing officials, to take action to prevent or stop the sexual harassment at Uni High constitutes deliberate indifference to Jane's rights under the Constitution and laws of the United States, including, but not limited to, her rights to equal protection of law as provided by the Fourteenth Amendment, in violation of 42 U.S.C. § 1983.

109. As a result to defendants' violations of 42 U.S.C. § 1983, the unwelcome sexual harassment was severe and pervasive during the Spring semester of 1993 and throughout the entire 1993-1994 school year.

110. As a result of defendants' violations of 42 U.S.C. § 1983, Jane has suffered and will continue to suffer severe mental and emotional distress, including,

but not limited to, depression, fear, anxiety, inability to concentrate at school, manifestation of suicidal tendencies, signs of post-traumatic stress disorder, and injury to her reputation. As a result of these problems, Jane has undergone and continues to undergo psychiatric and psychological treatment and has incurred and continues to incur medical expenses.

111. As a result of defendants' violations of 42 U.S.C. § 1983, Jane was unable to finish her schooling at Uni High and was compelled to leave town and pursue her education at an out-of-state private school in order to escape the hostile environment of Uni High and the damage to her reputation in the community, yet to obtain an education equal to that offered by Uni High. As a result, Jane and her parents have incurred expenses for tuition and travel to attend an out-of-state private school.

WHEREFORE, plaintiffs respectfully request relief as set forth below.

Count IV

Family Expense Act, 750 ILCS 65/15
(Against All Defendants)

112. Plaintiffs reallege paragraphs 1-111.

113. As a result of defendants' violations of Title IX and 42 U.S.C. § 1983, Mr. and Mrs. Doe were caused to expend funds for medical services and treatment, and tuition at an out-of-state private school, in amounts to be proven at trial.

114. Pursuant to the Illinois Family Expense Act, 750 ILCS 65/15, defendants are liable for such expenses.

WHEREFORE, plaintiffs respectfully request relief as set forth below.

Claim for Relief on All Counts

Plaintiffs, JANE DOE, a minor, by JOHN DOE, individually and as father and next friend, and JANET DOE, individually and as mother and next friend, respectfully request that this Court enter judgment in its favor and against defendants, UNIVERSITY OF ILLINOIS, ALICE DEAN DAVIS-SMITH, JOEL CRAMES, HENRY MEARES, BARBARA L. WYSOCKI, WILLIAM R. SUTTON, THEODORE L. BROWN, SUSAN T. GONZO, and LARRY R. FAULKNER, and award plaintiffs:

a. actual damages suffered as a result of defendants' violations of Title IX and 42 U.S.C. § 1983, including, but not limited to, special damages for medical services and treatment and tuition, in an amount to be proven at trial;

b. compensatory damages for emotional distress suffered as a result of defendants' violations of Title IX and 42 U.S.C. § 1983;

c. punitive damages for defendants' willful violations of Title IX and 42 U.S.C. § 1983;

d. expenses incurred for medical services and treatment and tuition pursuant to the Illinois Family Expense Act, 750 ILCS 65/15;

e. attorneys' fees and costs incurred herein pursuant to the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988; and

f. such further relief as this Court deems appropriate.

DATED: May 23, 1995

JANE DOE, a minor, by JOHN DOE, individually and as father and next friend, and JANET DOE, individually and as mother and next friend

By: /s/ Sheryl L. Jaffee
One of Their Attorneys

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UNITED STATES OF AMERICA

Intervenor-Appellant

and

CHRISTY BRZONKALA

Plaintiff

v.

ANTONIO J. MORRISON; JAMES LANDALE CRAWFORD

Defendants-Appellees

and

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY; CORNELL D. BROWN; WILLIAM E. LANDSIDLE, in his capacity as Comptroller of the Commonwealth

Defendants

LAW PROFESSORS; VIRGINIANS ALIGNED AGAINST SEXUAL ASSAULT; THE ANTI-DEFAMATION LEAGUE; CENTER FOR WOMEN POLICY STUDIES; THE DC RAPE CRISIS CENTER; EQUAL RIGHTS ADVOCATES; THE GEORGETOWN UNIVERSITY LAW CENTER SEX DISCRIMINATION CLINIC; JEWISH WOMEN INTERNATIONAL; THE NATIONAL ALLIANCE OF SEXUAL ASSAULT COALITIONS; THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; THE NATIONAL COALITION AGAINST SEXUAL ASSAULT; THE NATIONAL NETWORK TO END DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN; NORTHWEST WOMEN'S LAW CENTER; THE PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, INCORPORATED; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; VIRGINIA NOW

LEGAL DEFENSE AND EDUCATION FUND, INCORPORATED; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S LEGAL DEFENSE FUND; INDEPENDENT WOMEN'S FORUM; WOMEN'S FREEDOM NETWORK

Amici Curiae

ORDER

A member of the Court has sua sponte suggested that this case be reheard in banc. A majority of judges having voted in a poll of the Court to grant rehearing in banc,

IT IS ORDERED that rehearing in banc is granted.

IT IS FURTHER ORDERED that this case shall be calendared for argument on March 3, 1998.

Within ten days of the date of this order, the parties and amicus curiae shall file twenty additional copies of all briefs and supplemental authorities previously filed in this case, and appellees shall file twenty additional copies of the appendix.

The parties may submit additional briefs of no more than ten pages addressing: (1) whether Congress has authority under the Constitution to enact the Violence Against Women Act and (2) whether the complaint states a cause of action under Title IX of the Education Amendments? Twenty copies of the parties' additional briefs

shall be filed in the office of the clerk on or before February 23, 1998.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor
CLERK

(2)

Supreme Court, U.S.
FILED
AUG 14 1998
OFFICE OF THE CLERK

No. 98-126

In The

Supreme Court of the United States

October Term, 1997

THE BOARD OF TRUSTEES OF
THE UNIVERSITY OF ILLINOIS,

Petitioner,

vs.

JANE DOE,

Respondent,

and

THE UNITED STATES,

Intervenor-Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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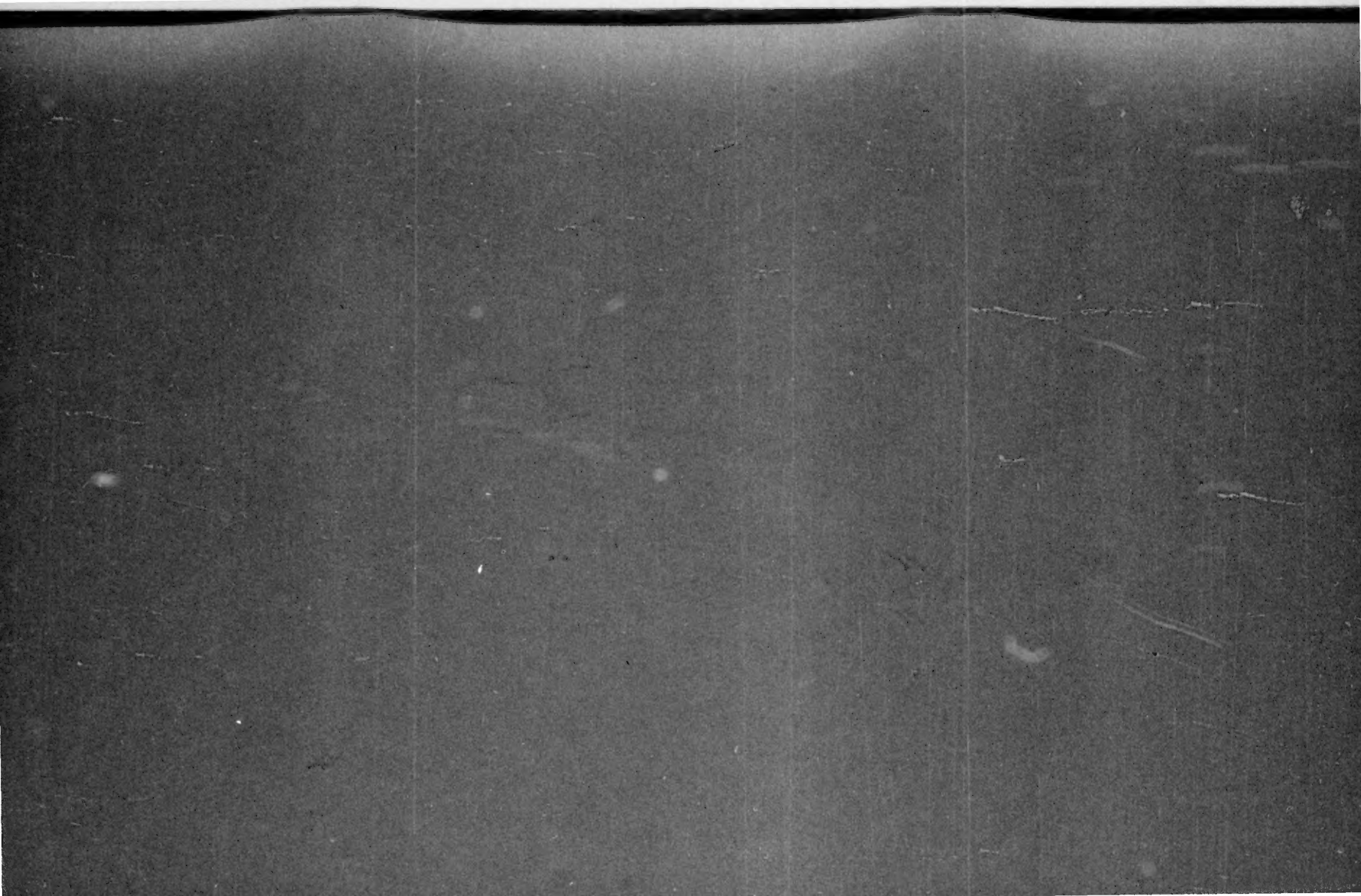

QUESTIONS PRESENTED

1. Has Jane Doe ("Jane") stated a cause of action under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), where she has alleged that Petitioner (a recipient of federal funds) discriminated against her when it had actual knowledge of ongoing, pervasive verbal and physical sexual harassment by her fellow students and, with intentional indifference, failed to take prompt, appropriate, and effective preventative and remedial action?

2. Did Congress abrogate Petitioner's Eleventh Amendment immunity from suit under Title IX pursuant to its powers under the Spending Clause and Section 5 of the Fourteenth Amendment when it enacted the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7 (the "Equalization Act")?

LIST OF PARTIES

This action was filed by John and Janet Doe (Jane's parents) individually, and on behalf of Jane, then a minor. Jane has since reached the age of majority. Jane's parents' individual claims have been dismissed.

Jane, a former student of University High School ("Uni High"), which Petitioner owns and oversees, brought claims against Petitioner and eight administrators of Petitioner and Uni High. Jane's claims against the individual administrators were dismissed based on the district court's ruling that a Title IX action against an educational institution forecloses an action against individual state actors under 42 U.S.C. § 1983 for violation of Title IX and the Equal Protection Clause. (P.A. 84).[1]

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[1] References to Petitioner's Appendix are cited herein as "P.A. ___."

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner correctly notes that this case involves U.S. Const. art. I, § 8, cl. 1, U.S. Const. amend. XI, U.S. Const. amend. XIV, and Title IX. This case also involves the Equalization Act, reprinted in the Appendix hereto at A.1, as well as 34 CFR § 106.8, reprinted in the Appendix hereto at A.2, and the Department of Education Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (1997) ("OCR Guidance"). Contrary to Petitioner's contention, the Petition does not raise the constitutionality of an act of Congress.

STATEMENT OF THE CASE

A. Factual Background

In an effort to conceal the facts Jane alleges which establish intentional discrimination in violation of Title IX, Petitioner ignores the extent of the sexual harassment perpetrated by Jane's peers and mischaracterizes its own "responsive efforts" in the face of seventeen months of unabated sexual harassment.[2]

---

[2] Petitioner's comment that it is not "alleged to be responsible for the alleged sexual misconduct of student M. in late 1992 and early 1993 which led to the alleged harassment of Doe by her student peers" demonstrates a fundamental misunderstanding of the nature of Jane's cause of action. Jane does not seek to hold Petitioner liable for the actions of the harassing students, but rather Petitioner's own action and inaction despite its knowledge that such harassment was

In January 1993, a self-declared "posse" of thirteen-year-old Jane's peers began a campaign of sexual harassment against Jane. Among other sexual epithets and ridicule, acts of exhibitionism, and unwelcome sexual advances, members of the posse scribbled on classroom desks "Jane is a slut," "Jane is a whore," "Jane is good in bed." (Compl. ¶ 25, P.A. 153). One boy exposed his genitals and buttocks to Jane and other students during class. (Compl. ¶¶ 29, 59; P.A. 154, 160). Another boy repeatedly stroked Jane's legs and tried to force his hand up her skirt during class. (Compl. ¶ 53; P.A. 159-60).

In February 1993, Jane told the Principal of Uni High about the harassment. He assured Jane the sexual harassment would be remedied. (Compl. ¶ 32; P.A. 155). When the Principal detained Jane's classmates and threatened them with expulsion if the harassment continued, the students openly blamed Jane for the "lecture." (Compl. ¶ 33; P.A. 155).[3] The Uni High Counselor summoned Jane to discuss her complaints of sexual harassment and asked Jane if people ever called her a "know-it-all bitch." The Counselor advised Jane's mother that the sexual harassment was "a Jane problem" and that "it is Jane who has to change." (Compl. ¶¶ 34, 37; P.A. 155-56).

In a letter to Jane's parents, Petitioner's Interim Vice Chancellor admitted knowledge of the sexual harassment, promised that a sexual harassment policy would be implemented and distributed to students at the beginning

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occurring. Unlike Petitioner, the Seventh Circuit understood this important distinction. *See Doe v. University of Ill.*, 138 F.3d 653, 662 (7th Cir. 1998).

[3] This was apparently an empty threat, as no student was ever expelled despite the ongoing harassment.

of the new school year, and acknowledged the need to "create the most supportive atmosphere possible for learning and development." (Compl. ¶¶ 42-43; P.A. 157). At an assembly during the first week of the new school year, Uni High's Assistant Director reported to Jane's classmates "trouble" with legal personnel and that distribution of a new handbook was required. The students groaned and laughed when he read, in a mocking manner, a list of prohibited sexual harassment behavior. (Compl. ¶ 47; P.A. 158).

None of this conduct that Petitioner calls "responsive efforts" stopped or lessened the sexual harassment. Instead, Petitioner's so-called "responsive efforts" caused pervasive retaliation including continued harassment. (Compl. ¶¶ 33, 65, 70, 73-74, 76; P.A. 155, 162-64).

When Jane sought from Uni High's Assistant Director protection against the retaliation, he told Jane to "separate the wheat from the chaff" and start acting like a "normal female," chastised her for skipping class and scolded her for making allegations which could adversely affect the boys' futures. (Compl. ¶¶ 64-66; P.A. 161-62).

Petitioner failed to designate an official responsible for intake and investigation of complaints and failed to inform Jane of such an official until January 1994 – approximately one year after the sexual harassment began. (Compl. ¶ 32; P.A. 155). Jane twice tried to file a sexual harassment complaint with the newly appointed "intake person." Both times, he refused to take her complaint. Instead, he informed Jane that the boys who sexually harassed her had a good reason for not liking her. (Compl. ¶¶ 61, 81, 84; P.A. 161, 164-65).

One year after the harassment began, an investigation was conducted that led to further retaliation by Jane's classmates. They blamed her, called her a bitch, and threatened to kill her. (Compl. ¶¶ 63, 65; P.A. 161, 162). When a student was moved out of one of Jane's classes, the student blamed Jane, called her a "bitch," "slut," and "whore," and told his classmates Jane was the problem. (Compl. ¶ 73; P.A. 163). Despite Jane's parents' plea for help from several officials of Petitioner, no action was taken to curtail the continued harassment. (Compl. ¶¶ 74-75; P.A. 163-64).

Petitioner failed to adopt and publish grievance procedures providing guidelines for prompt and equitable resolution of sexual harassment complaints until May 1994 – when Petitioner had allowed the sexual harassment to persist for approximately seventeen months and grow so vicious and intolerable that Jane was forced to withdraw from school and leave town. (Compl. ¶¶ 40, 48, 97; P.A. 156, 158-59, 168).[4]

Jane contends Petitioner was intentionally indifferent to her complaints, and Petitioner's knowledge of seventeen months of unabated sexual harassment and hostility, and failure to take prompt, appropriate remedial action, constitutes intentional sex discrimination in violation of Title IX. (Compl. ¶¶ 95-96; P.A. 167-68).

---

[4] All of these facts must be taken as true, and all reasonable inferences must be drawn in Jane's favor, as this case was decided by the district court on Petitioner's 12(b)(6) motion to dismiss. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984).

B. Procedural Background

In her Complaint, Jane alleged both intentional discrimination (Count I) and reckless discrimination (Count II) in violation of Title IX. (P.A. 167-70). On January 22, 1996, Magistrate David G. Bernthal filed his Report and Recommendations ("Report") regarding Defendants' motion to dismiss the Complaint. (P.A. 86-133). Magistrate Bernthal found that a student may state a cause of action under Title IX for student-to-student sexual harassment (P.A. 120). However, he recommended dismissal without prejudice of Jane's Count I Title IX claim, advising Jane to replead this claim to allege that Petitioner's "failure to remedy the students' sexual harassment campaign was motivated by an intent on the part of [Petitioner] to discriminate against [Jane] on the basis of her sex." (P.A. 127). He recommended dismissal of Count II with prejudice. (P.A. 128).

On March 29, 1996, Judge Michael M. Mihm denied the parties' objections and adopted the Report in its entirety. (P.A. 80-85). The district court dismissed Count I without prejudice and dismissed Count II with prejudice. (P.A. 83-84). The court granted Jane leave to replead her Count I Title IX claim within 21 days. (P.A. 83). Both Jane and Petitioner moved for reconsideration or certification pursuant to 28 U.S.C. § 1292(b).

On September 25, 1996, the district court entered an order (i) denying both parties' motions to reconsider, (ii) denying Petitioner's motion for certification of whether the Eleventh Amendment bars suit against Petitioner for violation of Title IX; and (iii) granting Jane's motion for 1292(b) certification of the issue of whether Petitioner's

knowledge of and failure to remedy the sexual harassment of Jane gives rise to a cause of action under Title IX. (P.A. 69-79).

On October 3, 1996, Jane timely filed her petition for permission to appeal to the Seventh Circuit the district court's dismissal of her Title IX claims. On October 4, 1996, Petitioner filed its notice of appeal of the district court's rejection of its claim of Eleventh Amendment immunity. On December 5, 1996, the Seventh Circuit granted Jane's petition for permission to appeal, as well as her motion to consolidate the parties' appeals. The United States intervened to address the validity of Congress' abrogation of Eleventh Amendment immunity. The issues were fully briefed, and the Seventh Circuit heard oral argument on September 3, 1997. During the course of the appeal, both parties submitted various additional authority pursuant to F.R.App.P. 28(j).

On March 3, 1998, the Seventh Circuit reversed the district court's dismissal of Jane's Title IX claim and affirmed the district court's rejection of Petitioner's Eleventh Amendment immunity defense. The Seventh Circuit held that "Title IX does make schools liable for failure to respond promptly and appropriately to known student-on-student sexual harassment." 138 F.3d at 667 (P.A. 34).

Contrary to Petitioner's contention, the Seventh Circuit did not hold that a cause of action for monetary damages can be maintained under Title IX against educational institutions

accepting federal funds without requiring proof of discriminatory intent.[5] Rather, the court rejected the district court's requirement that Jane plead and prove that the failure to respond was *as a result of* sexually discriminatory intent, holding that "[t]he failure promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex, and so, once a plaintiff has alleged such failure, *she has alleged the sort of intentional discrimination against which Title IX protects.*" *Id.* at 661 (emphasis added) (P.A. 18).

With respect to the Eleventh Amendment issue, Petitioner did not question in the district court or in the Seventh Circuit whether enactment of Title IX was within Congress' power under Section 5 of the Fourteenth Amendment, but rather whether Congress in fact enacted Title IX pursuant to that power. *Id.* at 658 (P.A. 9). The Seventh Circuit agreed with the Eighth Circuit that Title IX was enacted and extended to the states as a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment. *Id.* at 659-60 (citing *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997)) (P.A. 12-14).[6] The court went

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[5] The five separate opinions in *Doe* do not conflict, to the extent that all of them recognize that Title IX prohibits *intentional* discrimination.

[6] Recognizing that Congress may draw on more than one source of power in enacting a piece of legislation, the Seventh Circuit noted that "it is equally sensible that Congress, in using federal educational funds as the core of Title IX, should use its Spending Clause powers to reach private actors and its Fourteenth Amendment powers to reach the States." *Doe*, 138 F.3d at 659 (P.A. 13).

on to hold that Congress validly abrogated States' Eleventh Amendment immunity from suit when it passed the Equalization Act, "expressly making States subject to suits to enforce Title IX." *Id.* at 660 (P.A. 15).

The Seventh Circuit rejected Jane's contention that Eleventh Amendment immunity is unavailable in suits based solely on federal question jurisdiction, relying on cases dating back to 1890 when this Court first departed from the express language and meaning of the Eleventh Amendment. *Id.* at 656-67 (P.A. 6-7). Also, in light of its conclusion that Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment when it enacted the Equalization Act, the Seventh Circuit declined to rule whether Petitioner's acceptance of federal funds constitutes a waiver of its Eleventh Amendment immunity from suit under Title IX, as expressly provided in the Equalization Act. *Id.* at 660 (P.A. 15).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Seventh Circuit's Decision in *Doe* Does Not Conflict With This Court's Ruling in *Gebser v. Lago Vista.*

The Seventh Circuit held in *Doe* that a student states a cause of action for intentional discrimination under Title IX where she alleges that an institution receiving federal funds fails to respond promptly and appropriately to student-on-student sexual harassment about

which school officials have actual knowledge. 138 F.3d at 661. This is consistent with and tantamount to this Court's ruling in *Gebser v. Lago Vista Independent School District* that an institution is subject to liability under Title IX when it is shown that an individual with authority to address discrimination and to institute corrective measures has actual knowledge of discrimination and fails to adequately respond. 118 S. Ct. 1989, 1999 (1998).[7]

Contrary to Petitioner's contention, the Seventh Circuit in *Doe* did not arrive at an "easier standard" of liability than that set forth by this Court in *Gebser*. This Court in *Gebser* noted that the institution's response (or lack thereof) to known discrimination must amount to "deliberate indifference," defined by this Court as an official decision by the institution not to remedy the violation. *Id.* at 1999. This is the essence of the Seventh Circuit's holding in *Doe*, and precisely what Jane has alleged: Petitioner's actual knowledge of and *intentional indifference* to her repeated complaints of sexual harassment. (Compl. ¶ 95-96; P.A. 167-68).[8] Whether Petitioner's

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[7] To the extent there is any perceived difference between the Seventh Circuit's decision in *Doe* and this Court's analysis in *Gebser*, it must be noted that *Gebser* was decided in a different factual context from this case, as it involved a sexual relationship between a teacher and a student, as opposed to the student-on-student sexual harassment here. Moreover, unlike Jane Doe in this case, the student in *Gebser* did not contend she could prevail under an actual notice standard. 118 S. Ct. at 1999-2000.

[8] This also comports with Judge Posner's opinion in *Doe*, where he noted that a student establishes deliberate indifference in the face of known student-on-student sexual harassment when the student shows that the institution

failure to respond quickly, appropriately, or effectively to sexual harassment that continued unabated for nearly seventeen months reflects a conscious choice amounting to intentional discrimination is a factual inquiry not properly resolved by this Court or the Seventh Circuit, but rather appropriately left for a jury to decide.

II. There Is No Conflict In the Circuits As to Whether Liability Under Title IX Requires a Showing of Discriminatory Intent.

The Petition is grounded in a mischaracterization of the decision in the court below. According to Petitioner, the Seventh Circuit ruled that Jane may proceed on her Title IX claim without establishing discriminatory intent. The Seventh Circuit made no such ruling. Rather, the Seventh Circuit expressly recognized that proof of discriminatory intent is required for plaintiffs to obtain monetary damages under Title IX. *Doe*, 138 F.3d at 661, 663 (P.A. 18, 22-23).

The Seventh Circuit's decision in *Doe* does not conflict with *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S. Ct. 165 (1996) or *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*), *petition for cert. filed*, 66 USLW 3387 (Nov. 19, 1997), to the extent that all three courts are in general

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deliberately failed to act, or took steps it knew would be ineffectual to protect the student. 138 F.3d at 680 (Posner, C.J., dissenting from denial of reh'g *en banc*) (P.A. 68).

agreement regarding the necessity of pleading and proving discriminatory intent.[9] Contrary to Petitioner's contention, neither the Fifth nor Eleventh Circuit has denied the existence of a cause of action under Title IX for student-on-student sexual harassment. Rather the two circuits identify methods different than the Seventh Circuit identified in *Doe* for proving such a claim.[10]

To the extent *Rowinsky* and *Davis* conflict with *Doe* as to the facts required to plead and prove discriminatory intent, the *Rowinsky* and *Davis* opinions have been discredited by numerous courts, including the court below, as well as the Department of Education's Office for Civil

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[9] It is the nature and extent of the facts that must be alleged and proven to establish such discriminatory intent that divides the circuits. However, such a factual inquiry is not appropriate for review by this Court, but rather should be determined on a case-by-case basis by the finder of fact. In this case, the Seventh Circuit expressly found that the facts alleged by Jane would allow a jury to find that Petitioner failed to respond promptly and appropriately to Jane's complaints. *Doe*, 138 F.3d at 668. The Seventh Circuit took all facts alleged by Jane to be true, as this case came before the Seventh Circuit on interlocutory appeal of a 12(b)(6) dismissal. This provides another reason to deny the Petition, as this Court commonly declines to review interlocutory decisions. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock RR*, 389 U.S. 327, 328 (1967). Nothing here warrants a departure from that practice.

[10] This Court denied a petition for writ of certiorari in *Rowinsky*. The plaintiff's petition for writ of certiorari in *Davis* is pending. The issues framed by the parties in *Davis* include whether principles developed under Title VII (a "knew or should have known" standard) should apply to peer sexual harassment claims under Title IX. In the event this Court grants the *Davis* petition, the issue raised by Petitioner herein will, presumably, be addressed.

Rights – the administrative agency charged with enforcing Title IX. *See, e.g., Doe,* 138 F.3d at 662 ("The Fifth Circuit's rule would leave schools completely free to ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore any complaints they might receive from their male students.") (P.A. 20-21); *Oona, R.-S.- v. McCaffrey,* 143 F.3d 473, 477 (9th Cir. 1998) ("We have difficulty squaring the reasoning of those cases [*Davis* and *Rowinsky*] with the Supreme Court's in Franklin and our own in Petaluma."), *petition for cert. filed,* 67 USLW 3083 (June 19, 1998); OCR Guidance, 62 Fed. Reg. at 12036, 12048 ("OCR believes that the *Rowinsky* decision misinterprets Title IX.").[11] *See also Franks v. Kentucky Sch. for the Deaf,* 956 F. Supp. 741, 746 (E.D. Ky. 1996), *aff'd,* 142 F.3d 360 (6th Cir. 1998) and *Doe v. Petaluma City Sch. Dist.,* 949 F. Supp. 1415, 1421 (N.D. Cal. 1996) (both rejecting *Rowinsky* and adopting reasoning of Panel opinion in *Davis*).

Petitioner also incorrectly states that the Seventh Circuit relied upon the Fourth Circuit's vacated panel opinion in *Brzonkala v. Virginia Polytechnical Institute and State University,* 132 F.3d 949 (1997), *reh'g en banc granted, opinion vacated* (4th Cir. 1998). Other than two passing references to the *Brzonkala* holding, the Seventh Circuit did

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[11] Contrary to Petitioner's assertion, this Court in *Gebser* did not reject OCR's Guidance (only a fraction of which is quoted by Petitioner), but rather rejected the idea that an institution can be held liable for sexual harassment under Title IX without actual knowledge of the harassment. 118 S. Ct. at 1995. That issue does not arise in this case, where actual knowledge is admitted by Petitioner. *See Doe,* 138 F.3d at 668.

not *rely* on it. *Doe*, 138 F.3d at 661, 668 (P.A. 17, 35). Rather, the Seventh Circuit expressly rejected *Brzonkala's* lesser "knew or should have known" standard, the standard advocated by Jane in this case in the district court and on appeal. *Id.* at 667, 668 (P.A. 32, 35-36).[12]

Petitioner also incorrectly states that no other circuit court has addressed the existence of a claim under Title IX for failure to remedy student-on-student sexual harassment. The Ninth Circuit has ruled that Title IX requires school officials to take reasonable steps to remedy sexual harassment by students. *See Oona*, 143 F.3d at 477 (addressing Section 1983 claim based on violation of Title IX). The Tenth Circuit has also recognized a cause of action for peer sexual harassment. *See Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996) (adopting test set forth by Eleventh Circuit panel in *Davis*, but declining to address standard of liability because challenged conduct was not based on sex).[13]

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[12] Much of the Fourth Circuit's panel decision in *Brzonkala* dealt with the Violence Against Women Act. It is unknown whether the opinion was vacated primarily based on the court's ruling in that regard.

[13] That the express language and legislative history of Title IX do not contemplate a cause of action for student-on-student sexual harassment is inapposite. Neither Title IX's language nor its history contemplate a cause of action for teacher-student sexual harassment; yet this Court has expressly found such harassment to be actionable under Title IX. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65 (1992); *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979) (recognizing implied private right of action under Title IX).

The Seventh Circuit understood that Jane does not seek to hold Petitioner liable for its students' conduct, but rather for its own conduct in failing to respond in any meaningful way to Jane's complaints of ongoing, pervasive sexual harassment. *Doe*, 138 F.3d at 662 (P.A. 19-20). Petitioner, like the district court, contends that a plaintiff cannot prove intentional sexual discrimination under Title IX without establishing that the failure to respond promptly and appropriately to remedy sexual harassment was *"by reason of sex."* Yet, as the Seventh Circuit recognized, the failure to take prompt, appropriate remedial action despite knowledge of sexual harassment is, itself, intentional discrimination on the basis of sex. *Id.* at 663 (P.A. 18).[14]

Contrary to Petitioner's contention, the Seventh Circuit did not overlook the contractual nature of Title IX as Spending Clause legislation, and the notice to which states are entitled regarding potential liability for violations. Rather, the Seventh Circuit expressly acknowledged that Title IX was enacted, in part, pursuant to Congress' spending power. *Id.* at 662 (P.A. 21). The court then emphasized this Court's ruling in *Franklin*, quoted only in part by Petitioner, that "[t]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. *This notice problem does not arise in a case such as this, in which intentional*

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[14] Petitioner's citation of *St. Mary Honor Center v. Hicks*, 509 U.S. 502 (1993) is unavailing, as *Hicks* was not a sexual harassment case, but rather involved a claim of disparate treatment.

discrimination is alleged." 503 U.S. at 74-75. *See Doe*, 138 F.3d at 663 (P.A. 22).

Petitioner also mischaracterizes and misconstrues the Seventh Circuit's reliance on Title VII to reach its decision. Contrary to Petitioner's implication, the Seventh Circuit did not hold that Title VII principles should be imported wholesale into the Title IX arena. Rather, the court noted differences in the language and history of Title IX and Title VII and expressly rejected the use of Title VII agency principles (and the lesser "knew or should have known" standard commonly associated with a negligence theory), given that Jane does not base her Title IX claim on a theory of vicarious liability. The Seventh Circuit did not adopt Title VII standards, but noted that Title VII jurisprudence supports a cause of action under Title IX for direct liability for failure to respond appropriately to sexual harassment about which educational institutions have actual knowledge. *Doe*, 138 F.3d at 666-67 (P.A. 30, 32).

III. There Is No Conflict In the Circuits (or Between the Seventh Circuit's Decision in *Doe* and Any Decision of This Court) Concerning Whether Congress Has Abrogated the States' Eleventh Amendment Immunity From Suit Under Title IX Pursuant To a Valid Exercise of Constitutional Power.

In 1986, Congress made clear that it had enacted the Equalization Act, in part, pursuant to its powers under Section 5 of the Fourteenth Amendment: "to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth

amendment, S. 1579 makes Congress' intention 'unmistakably clear in the language of the statute' to subject States to the jurisdiction of Federal courts. 105 S. Ct. at 3147. See *Fitzpatrick versus Bitzer*, 427 U.S. 445 (1976)." 132 Cong. Rec. 28624 (quoting Rep. of U.S. Dept. of Justice, Office of Leg. and Intergov'tal Affairs, Washington, D.C., July 13, 1986).

Since Congress' enactment of the Equalization Act in 1986, circuit courts to address the issue have *uniformly* recognized that states do not enjoy Eleventh Amendment immunity in suits under Title IX and Title VI – the model for Title IX. *See, e.g., Doe*, 138 F.3d at 660 (7th Cir.) (Title IX) (P.A. 15); *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (Title IX); *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997) (Title IX); *Dekalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 688, n.16, *reh'g denied*, 120 F.3d 276 (11th Cir.), *cert. denied*, 118 S. Ct. 601 (1997) (Title VI); *Egerdahl v. Hibbing Community College*, 72 F.3d 615 (8th Cir. 1995) (Title VI and Title IX); *Seater v. California State Univ.*, 48 F.3d 1228 (9th Cir. 1995) (Title VI); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498 (2d Cir. 1990) (Title VI).

In 1992, this Court likewise recognized that Congress abrogated the states' Eleventh Amendment immunity when it enacted the Equalization Act. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992). Two years ago, this Court again emphasized that Congress had "craft[ed] an *unambiguous waiver of the States' Eleventh Amendment immunity*" when it enacted the Equalization Act. *Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (emphasis added).

Petitioner's argument that Congress could not have drawn on its Section 5 powers simply because it did not explicitly state that it drew on such powers is simply unsupported by this Court's prior decisions. This Court has long held that Congress need not have used the words "Section 5," "Fourteenth Amendment," or "equal protection" to have exercised its powers under Section 5 of the Fourteenth Amendment. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983).

Petitioner's reliance on *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) is inapposite. *Pennhurst* does not stand for the proposition that Congress must specify that it has acted pursuant to its power under Section 5 of the Fourteenth Amendment in order for it to have done so. *Doe*, 138 F.3d at 658. And neither *Pennhurst* nor *Gregory v. Ashcroft*, 501 U.S. 452 (1991) involved an issue of sovereign immunity. *Id.* Petitioner's reliance on the dissenting opinion in *Timmer v. Michigan Department of Commerce*, 104 F.3d 833 (6th Cir. 1997) is curious, since the majority in *Timmer* rejected arguments much like those advanced by Petitioner here. In any case, Petitioner fails to identify a conflict or any other reason that would justify granting certiorari on this settled issue.

In any event, Petitioner's acceptance of federal funds constitutes a waiver of its Eleventh Amendment immunity, pursuant to the Equalization Act. When Congress enacted the Equalization Act in 1986, it expressly conditioned Petitioner's receipt of federal funds on its consent to federal jurisdiction: "To the extent that the proposed amendment is grounded on congressional spending powers, S. 1579 *makes it clear to states that their receipt of Federal funds constitutes a waiver of their eleventh amendment*

immunity." 132 Cong. Rec. 28624 (quoting Rep. of U.S. Dept. of Justice, Office of Leg. and Intergov'tal Affairs, Washington, D.C., July 13, 1986) (emphasis added). *See also Clark v. California*, 123 F.3d 1267, 1271 (9th Cir.), *cert. denied*, 118 S. Ct. 2340 (1998).

The Eleventh Amendment does not bar suit against a state when the state has waived its immunity and consents to suit in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, *reh'g denied*, 473 U.S. 926 (1985). As alleged in the Complaint, Petitioner receives federal funds. (Compl. ¶ 5; P.A. 150). Therefore it has consented to suit in federal court for its violation of Title IX.

The Seventh Circuit declined to rule whether Petitioner's acceptance of federal funds constitutes a waiver of Eleventh Amendment immunity under Title IX, as expressly provided in the Equalization Act. The court found it was unnecessary to resolve this issue, given its conclusion that Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid exercise of power. 138 F.3d at 660 (P.A. 15). This is another settled issue that supports the decision below, thus warranting denial of the Petition.

IV. Petitioner Failed To Preserve In the Courts Below the Issue of Whether Congress Exceeded Its Power Under Section 5 of the Fourteenth Amendment When It Enacted Title IX and Extended It To the States.

This Court has long held that, absent exceptional circumstances, questions not pressed or passed upon below are not reviewed by this Court. *Duignan v. United*

States, 274 U.S. 195, 200 (1927). No exceptional circumstances exist here.

An issue is not pressed or passed on below absent a "real contest" concerning an issue at earlier stages of the case. *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983). Petitioner did not question in the district court or in the Seventh Circuit whether enactment of Title IX was within Congress' power under Section 5 of the Fourteenth Amendment.[15] Rather, the issue framed by Petitioner, addressed by Jane, and ruled upon by the court below, was whether Congress in fact enacted Title IX pursuant to that power. 138 F.3d at 658. Petitioner alluded to the issue of whether Congress exceeded its Section 5 authority for the first time in its petition for rehearing. The record is devoid of any "real contest" on that issue. Accordingly, to the extent that is the true issue for which Petitioner seeks certiorari, the Petitioner should be denied.[16]

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[15] Petitioner apparently recognizes this, as it does not directly raise in its Petition whether Title IX was an unconstitutional exercise of Congress' Section 5 power.

[16] Petitioner was aware of this Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) well before the Seventh Circuit rendered its decision in this case. In fact, whether Congress is empowered under Section 5 of the Fourteenth Amendment to enact legislation that prohibits some conduct that is not unconstitutional was raised by Petitioner in another case. *See Goshtasby v. Board of Trustees of Univ. of Ill.*, 141 F.3d 761, 769-72 (7th Cir. 1998) (argued Dec. 8, 1997) (rejecting Petitioner's argument that Congress exceeded its Section 5 enforcement power in enacting the ADEA). Yet Petitioner opted not to raise it in this case.

In any event, this Court has ruled that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . [T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) (citations omitted). The legislative history of Title IX clearly evinces Congress' intent to enforce the Equal Protection Clause of the Fourteenth Amendment. *Doe*, 138 F.3d at 658 n.5 (P.A. 9-10). This Court should not grant the Petition so that Petitioner may, for the first time, attack the constitutionality of Title IX.

V. Petitioner's Misconstruction and Misapplication of this Court's Holding In *City of Boerne v. Flores* Is a Novel and Insupportable Argument Adopted By No Other Court.

Petitioner contends the Seventh Circuit's recognition of a cause of action that does not require proof of discriminatory intent exceeds the substantive guarantees of the Fourteenth Amendment and conflicts with its holding that Congress abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment. Petitioner cites no legal authority to support its argument. Petitioner identifies no conflict in the circuits or between the Seventh Circuit and this Court. In any case, Petitioner's argument is unfounded in several respects.

First, as discussed in Part I herein, the Seventh Circuit expressly recognized that a Title IX plaintiff must prove discriminatory intent. Accordingly, Petitioner's repeated attempt to mischaracterize the Seventh Circuit's decision in order to conjure an issue worthy of certiorari should be disregarded.

Further, in *City of Boerne*, this Court addressed whether a statute was constitutional in light of the limits on *Congress'* power to enact legislation under Section 5 of the Fourteenth Amendment. As stated in Part IV *supra*, Petitioner does *not* contend that *Congress* exceeded its Section 5 powers when it enacted Title IX or the Equalization Act. Rather, Petitioner attempts to compare the *lower court's interpretation* of Title IX to the limits on *Congress' power to enact* Title IX. These are two separate legal questions; one addressing the scope of Congress' authority to pass a law, the other addressing the manner in which a court applies the law. This mixing of apples and oranges is insupportable.[17]

Petitioner's discussion of *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) is mere surplusage, as *Nabozny* was not a Title IX case, but rather one brought pursuant to Section 1983 alleging the *denial* of equal protection – a violation of Section 1 of the Fourteenth Amendment.[18] To the extent

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[17] Importantly, the issue raised by Petitioner arises in the context of assessing immunity under the Eleventh Amendment. This Court's decision in *City of Boerne* did not involve a question of Eleventh Amendment immunity.

[18] Petitioner's citation of *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) is, likewise, surplusage, as *Deshaney* was decided solely on due process

this case addresses the question at all, it concerns congressional power to enact legislation under Section 5 of the Fourteenth Amendment, not the judiciary's interpretation of the substantive reach of the Fourteenth Amendment. This distinction was made apparent long ago in *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1965) and is equally clear today. In *Katzenbach*, this Court set forth a three-part test to determine whether Congress properly enacted legislation under Section 5 of the Fourteenth Amendment. This test has been adopted by countless other courts, and Petitioner identifies no conflict in the circuits as to the application of the *Katzenbach* test. Rather, Petitioner wholly disregards the test, each element of which is satisfied in the context of Title IX.

Finally, this Court has recognized that legislation designed to deter or remedy unconstitutional conduct is appropriate under Congress' Fourteenth Amendment enforcement power even if it prohibits conduct which is not, itself, unconstitutional. *City of Boerne*, 117 S. Ct. at 2163. Accordingly, even conduct that does not evince discriminatory intent (and therefore would not violate the Constitution's guarantee of equal protection) can fall within the prohibition of legislation that is designed to deter or remedy equal protection violations. *See Varner v.*

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grounds. Jane has not asserted a due process claim and does not base her Title IX claims on the "special relationship" asserted in *Deshaney* and its progeny, but rather Petitioner's intentional failure to remedy a hostile environment caused by pervasive sexual harassment. Importantly, *Deshaney* did not hold that students may sexually harass other students or that educational institutions are immune from liability for failing to appropriately address and remedy sexual harassment.

Illinois State Univ., No. 97-3253, 1998 WL 407011 (7th Cir., July 21, 1998); *Clark*, 123 F.3d at 1270.[19] Simply stated, it is irrelevant that the cause of action that the Seventh Circuit held was actionable under Title IX would not be actionable under the Equal Protection Clause of the Fourteenth Amendment. Petitioner cites to no legal authority to establish otherwise.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

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[19] In *Varner*, the Seventh Circuit recently rejected the argument that the Equal Pay Act exceeds the scope of Congress' power to enforce the Fourteenth Amendment. The court held the Equal Pay Act to be a constitutional exercise of Congress' Section 5 power, even though, by not requiring proof of discriminatory intent, the Act proscribes some constitutional state action. 1998 WL 407011 at *10. Similarly, in *Clark*, the Ninth Circuit ruled that the ADA and Rehabilitation Act are proper exercises of Congress' Section 5 enforcement power, noting that "Congress's powers under the Fourteenth Amendment extend beyond conduct which is unconstitutional, and Congress may create broader equal protection rights than the Constitution itself mandates."

42 U.S.C. § 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Educational Amendments of 1972 [20 U.S.C.A. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date

The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

CODE OF FEDERAL REGULATIONS
TITLE 34 – EDUCATION
SUBTITLE B – REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER I – OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION
PART 106 – NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE
SUBPART A – INTRODUCTION

§ 106.8 Designation of responsible employee and adoption of greivance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(4)

FILED
OCT 21 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-126

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOARD OF TRUSTEES
OF THE UNIVERSITY OF ILLINOIS, PETITIONER

v.

JANE DOE, A MINOR, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an educational institution receiving funds under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe, persistent, and pervasive sexual harassment by other students in the course of the school's education programs and activities.

2. Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7, was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-126

BOARD OF TRUSTEES
OF THE UNIVERSITY OF ILLINOIS, PETITIONER

v.

JANE DOE, A MINOR, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals and the opinions by members of the court of appeals respecting the court's denial of rehearing en banc and dissenting from that denial (Pet. App. 1-68) are reported at 138 F.3d 653. The district court's orders (Pet. App. 69-79, 80-85) are not reported.

JURISDICTION

The court of appeals entered its judgment on March 3, 1998. A petition for rehearing was denied on April 14, 1998. Pet. App. 1, 134-135. The petition for a writ of

certiorari was filed on July 13, 1998. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Jane Doe, a minor, and her parents John and Janet Doe filed this action under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, seeking damages and other relief against petitioner Board of Trustees of the University of Illinois.[1] Pet. App. 148-174. Petitioner, a recipient of federal financial assistance, operates University High School in Urbana, Illinois, where respondent was a student from August 1992 to May 1994, when she was 13 and 14 years old. *Id.* at 150, 152. Doe alleges that during her two years at University High School she was subjected to a campaign of severe and pervasive unwelcome sexual harassment by a group of male classmates, that this harassment created an intolerable hostile educational environment for her, that she and her parents complained repeatedly to school officials, and that petitioner did not take appropriate remedial action but instead responded with intentional indifference amounting to intentional and wilful sex discrimination in violation of petitioner's obligations under Title IX as a recipient of federal financial assistance. *Id.* at 167-170.

Doe alleges that inappropriate sexual conduct by classmates began in late 1992 when a male classmate, M., pulled Doe onto his lap at school and "despite her

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[1] Doe also brought Title IX claims and a claim under 42 U.S.C. 1983, against various individual school and university officials, and alleged all defendants violated the Illinois Family Expense Act, 750 Ill. Comp. Stat. Ann. 65/15 (West 1993). Pet. App. 171-173. The district court dismissed the Title IX claims against the individual defendants, the Section 1983 claims, and the state law claims (*id.* at 82-85), and those claims are not before this Court.

struggle, unzipped her jeans in front of several other students." Pet. App. 152-153. Several weeks later, M. grabbed Doe's breasts under her sweater during lunch; on another occasion he tried to force his hands into her pants at the bus stop. *Id.* at 153. In January 1993, M. invited Doe to his home for a student gathering, but when Doe arrived there were no other students and M. sexually assaulted Doe. *Ibid.*

After Doe's parents complained to the parents of M., a popular basketball player at the school and the son of a university professor or administrator, M. precipitated a campaign of sexual harassment by a group of boys who called themselves the "posse." This campaign lasted for the remaining year and a half of Doe's schooling at University High, until her parents transferred her to a private school. Pet. App. 153. The posse wrote sexually derogatory comments about Doe and drew sexually oriented pictures of Doe on school desks, made sexual comments to her in the halls and in class, spit on her, and taunted her. *Id.* at 153-154. One boy exposed his genitals to her. *Id.* at 154.

Doe alleges that beginning in February 1993 she and her parents complained repeatedly to the principal and other school officials about the sexual harassment, but that school officials did not inform them about Title IX or refer them to any school official designated for investigating such complaints. Pet. App. 155-157. In March 1993, at an assembly, the school principal warned Doe's class to stop the harassment, but petitioner took no disciplinary action against the offending students. *Id.* at 155-156. When Doe and her mother spoke with a school counselor, the counselor blamed Doe. *Ibid.* Doe's father spoke with the principal on at least a monthly basis during the rest of that school year about the continued sexual harassment of Doe, but the

principal did nothing. *Ibid.* Continued complaints from Doe and her parents included a letter to the school counselor, reports to the school's assistant director, a request to see the school's rules and handbook (which had not been distributed for two years to the students or parents and which did not include a specific grievance procedure for sexual harassment claims), and a meeting with the principal requesting appropriate remedial measures for the following school year. The principal admitted that the school had no sexual harassment policy and he failed to offer any remedies. *Id.* at 156-157. Doe's parents ultimately went above the chain of command at the high school and spoke with University officials, including the vice chancellor, none of whom informed them of Doe's rights under Title IX. The university officials promised certain remedial measures by the school's officials the next year. *Id.* at 158.

In reliance on the promised remedial action, Doe returned to University High for another academic year. Doe alleges, however, that the promised remedies were never carried out. Pet. App. 157-158. When the new school year began, the school's assistant director read at an all-school assembly a list of prohibited sexual harassment behaviors "in a mocking manner which elicited laughter from the students." *Id.* at 158. A revised handbook specifically addressing sexual harassment was not distributed to students until May 1994. *Ibid.* The sexual harassment created a hostile environment which continued throughout the fall of 1993: classmates repeatedly made sexually degrading comments about Doe and her best friend, touched her sexually without her consent, and one boy made vulgar sexual gestures and exposed his buttocks to students during class. *Id.* at 159-160. Doe continued to report

the sexually harassing conduct to the school principal at the advice of the assistant director and a university official. *Ibid.* In or about October 1993, the principal suddenly left and an interim principal was appointed.

Only in January 1994, after the harassment had continued for a year, did petitioner's officials investigate Doe's allegations and take action against two of the students responsible. On January 21, Doe's parents met with the new principal to inform her about the assaults and sexual harassment campaign. The new principal said she had not been informed about it by school or university officials. Pet. App. 160-161. She found no written documentation of it in school records. *Id.* at 161. She told Doe's parents that the school was preparing a sexual harassment policy and procedure, notified them of the teacher designated to receive such complaints, and advised them to file a complaint with the teacher. They did not do so, because at the same time university officials had promised to initiate an investigation, and in fact they did so, interviewing numerous students on or about January 26. *Id* at 161-162. As a result, two of the posse boys were suspended for ten days. *Id.* at 162. .

When other students threatened to retaliate against Doe and her friend, including suggesting that they be murdered, Doe asked the assistant director for protection, but he responded by scolding her for making allegations that could adversely affect the two boys' futures. Pet. App. 162. Doe's mother reported additional death threats against Doe to the principal and the assistant director but nothing was done. *Id.* at 163. Complaints by Doe's parents to the university liaison and other university officials were unavailing. The teacher newly appointed to handle harassment complaints ignored messages from Doe's mother and re-

fused to speak with her, and tried to dissuade Doe from filing a formal complaint against one of the boys based on continued harassment after his return from suspension. *Id.* at 164-165. At a meeting at the end of May 1994 with the various school and university officials, the officials were not supportive or encouraging about prospects for remedial measures the next year. Doe's parents removed her from the school at the end of that school year and enrolled her in a private school in another State. *Id.* at 167, 169.

Doe alleges that, as a result of the harassment and petitioner's intentional indifference to her complaints and its failure to remedy the sexually hostile educational environment, she has suffered severe mental and emotional distress, including depression, an inability to concentrate at school, and suicidal tendencies. Pet. App. 154, 168. In February 1993, Doe began ongoing psychological counseling. *Ibid.*

2. The district court dismissed Doe's Title IX claims without prejudice on the ground that she failed to allege that petitioner's knowing inaction resulted from its intent to discriminate against Doe on the basis of sex. Pet. App. 83; see *id.* at 127-128. The district court certified the Title IX issue for immediate interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 77-79.

After this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), petitioner moved for reconsideration of the district court's Title IX ruling, seeking a dismissal with prejudice on the ground that the court lacked jurisdiction over the Title IX claims. Petitioner contended that the abrogation of Eleventh Amendment immunity for purposes of Title IX, which is contained in the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7, was not a valid waiver of the state university's Eleventh Amendment immunity from

suit for damages under Title IX. Pet. App. 73-74. The district court denied that motion, ruling that the abrogation contained in Section 2000d-7 was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment, noting that "[p]rohibiting arbitrary or discriminatory government conduct is the 'very essence' of the guarantee of equal protection under the Fourteenth Amendment." Pet. App. 76-77. The court also denied petitioner's motion for certification under 28 U.S.C. 1292(b) of an interlocutory appeal on the Eleventh Amendment claim. Pet. App. 79.

3. Doe appealed the district court's dismissal of her Title IX claim, and petitioner appealed the denial of its motion for reconsideration of its Eleventh Amendment defense. Pet. App. 5. The two appeals were consolidated. The United States intervened as appellee to defend the constitutionality of the Eleventh Amendment abrogation in 42 U.S.C. 2000d-7, as applicable to Title IX. See Pet. App. 1, 5. The United States also addressed the substantive Title IX issue, as amicus curiae in support of Doe. The court of appeals reversed the order dismissing Doe's Title IX claim and affirmed the order rejecting petitioner's Eleventh Amendment argument. *Id.* at 1-37.

a. The court of appeals held that "a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place." Pet. App. 18; see also *id.* at 59-60 (Evans, J., concurring). The court held that such a failure to take appropriate steps in response to

known sexual harassment is intentional discrimination on the basis of sex of the sort Title IX prohibits. *Id.* at 18. The court emphasized that the institution's liability should be measured, not by its success in eradicating harassment, but by the reasonableness of its efforts to do so. "As long as the responsive strategy chosen is one plausibly directed toward putting an end to the known harassment, courts should not second-guess the professional judgments of school officials. In general terms, it should be enough to avoid Title IX liability if school officials investigate aggressively all complaints of sexual harassment and respond consistently and meaningfully when those complaints are found to have merit." *Id.* at 35; see also *id.* at 61 (Evans, J., concurring) ("Considerable deference, I believe, must be given to schools in meeting these demands, and a wide range of reasonable responses should be permitted.").

In an opinion concurring in part and dissenting in part (Pet. App. 37-59), Judge Coffey agreed that Doe had stated a claim for a violation of Title IX, which "impose[s] liability upon fund recipients for failing to take prompt, appropriate remedial action in response to complaints of student-on-student sexual harassment, provided that responsible officials had actual knowledge of such harassment." *Id.* at 37. He disagreed in part, however, with the majority's articulation of the liability standard and sought to clarify certain ambiguities he perceived in the majority opinion. *Id.* at 38. He contended, *inter alia*, that "the proper question is whether" the action taken in response to complaints of harassment "was of such a nature that it effectively evinced the school's intent to perpetuate a sexually-hostile environment," which could be demonstrated where the institution's "response was so de minimis that it evidenced an endorsement of the harassment";

where the institution treated complaints differently based upon the sex of the complainants; or where the institution "departed from established policies and practices when punishing student harassers." *Id.* at 43-44 (footnotes omitted).

All three members of the panel recognized that the educational institution's liability arises not out of responsibility for the actions of the harassing students, but for its own failure to respond to the harassment. Pet. App. 32; see *id.* at 51-52 (Coffey, J., concurring in part and dissenting in part); *id.* at 59-60 (Evans, J., concurring).

b. With regard to petitioner's Eleventh Amendment defense, the court of appeals held that Congress validly abrogated the States' Eleventh Amendment immunity under Title IX when it enacted the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7. Pet. App. 5-15; *id.* at 37 (Coffey, J., concurring in part and dissenting in part). The court noted that petitioner "concedes, as it must, that Title IX and the Equalization Act, read together, unequivocally state Congress's intent to abrogate the States' Eleventh Amendment immunity." *Id.* at 7. And the court held that the abrogation constituted a valid exercise of congressional power under Section 5 of the Fourteenth Amendment. The court pointed out that, in *Seminole Tribe* v. *Florida*, 517 U.S. 44, 63-73 (1996), this Court overruled its ruling, in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), that the Interstate Commerce Clause authorized Congress to abrogate the States' Eleventh Amendment immunity. But *Seminole Tribe* also made it clear that Congress is authorized by Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity. 517 U.S. at 58-60, 71 n.15. Reaffirming the Seventh Circuit's pre-*Seminole* holding in *EEOC* v.

Elrod, 674 F.2d 601 (1982), the court of appeals rejected petitioner's contention that, in this context, congressional intent to exercise its Fourteenth Amendment authority must be unambiguously expressed in the statute. Pet. App. 9-14. The proper inquiry, the court held, is whether the objectives of the statute were within Congress's authority under the Fourteenth Amendment. *Id.* at 14. In the case of Title IX, "[t]he answer is, quite plainly, that they were." *Ibid.* "Prohibiting arbitrary, discriminatory governmental conduct . . . is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Id.* at 15 (quoting *Elrod*, 674 F.2d at 604) (internal quotation marks omitted). The express abrogation of the States' Eleventh Amendment immunity from suit in 42 U.S.C. 2000d-7, therefore, was a proper exercise of Congress's Section 5 powers. Pet. App. 15.[2]

c. Because the panel's decision conflicted with the decisions of other circuits, it was circulated among all active judges of the Seventh Circuit pursuant to Seventh Circuit Rule 40(e), but a majority of the judges did not favor rehearing en banc. Pet. App. 2 n.*.[3]

Judge Easterbrook issued a statement respecting the denial of rehearing en banc, emphasizing that the panel's holding that "failure to protect pupils from private aggression is a species of discrimination" is based on "the original meaning of equal protection of

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[2] In light of its ruling that Congress validly abrogated Eleventh Amendment immunity in enacting 42 U.S.C. 2000d-7, the court did not address Doe's alternative argument that petitioner waived its Eleventh Amendment immunity by accepting federal funds under Title IX. Pet. App. 15.

[3] The court of appeals also denied petitioner's petition for rehearing and suggestion for rehearing en banc. Pet. App. 134-135.

the laws." Pet. App. 62. He noted that no active member of the court expressed disagreement with that ruling. Rather, the disagreement involved only the level of knowledge and response required to be shown on the part of school officials in order to warrant imposition of liability. Judge Easterbrook thought en banc review of that issue neither necessary nor appropriate, because it was not clear in this case that the standard of liability would make any difference. *Id.* at 64.

Chief Judge Posner (joined by Flaum & Manion, JJ.), filed an opinion dissenting from the denial of rehearing en banc. Pet. App. 64-68. He agreed that an educational institution could be held liable for its failure to respond adequately to known instances of sexual harassment by students, but he believed that the majority's articulation of the standard for such liability might permit an institution to be held liable based solely upon a negligence standard. *Id.* at 65-66. To avoid this possibility, he "tentatively" advocated adoption of a standard of "deliberate indifference." *Id.* at 65.

No member of the court favored review by the full court of the Eleventh Amendment ruling. Pet. App. 62 (statement of Easterbrook, J.).

DISCUSSION

Petitioner seeks review of both rulings by the court of appeals: that Doe stated a claim for a violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and that Congress's enactment of 42 U.S.C. 2000d-7 to abrogate the States' Eleventh Amendment immunity from suit under Title IX was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

With respect to petitioner's contention that Doe failed to state a claim under Title IX, the petition should be held pending this Court's decision in *Davis* v. *Monroe County Board of Education*, cert. granted, No. 97-843, September 29, 1998, and disposed of in accordance with that decision or alternatively denied. In all other respects, the petition should be denied.

1. The Title IX issues raised by petitioner are likely to be resolved when this Court issues its decision in *Davis*. Like respondent Doe, the plaintiff in *Davis* brought a Title IX action against the entity responsible for the operation of her school based upon allegations that school officials had actual knowledge that she was subjected to sexual harassment by a fellow student, and responded with deliberate indifference. See *Davis* v. *Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc). The question before the Court in that case is whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student. Therefore, it would be appropriate for the petition in this case to be held pending this Court's decision in *Davis*, and disposed of in light of the decision in that case.

In the alternative, the Court should deny review of petitioner's Title IX claims. Because of the interlocutory nature of the decision below, review of the court of appeals' ruling at this stage is not warranted. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying petition for certiorari because court of appeals had remanded the case and it was thus not ripe for review); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases," review on certiorari is reserved for final judg-

ments). As Judge Easterbrook noted (Pet. App. 63), no member of the Seventh Circuit sought reconsideration of the panel's holding that failure to protect students from sexual harassment by other students is a species of sex discrimination; the only disagreement related to the standard for imposing school liability, a question not ripe for review at this stage of the case.

Moreover, the court of appeals' ruling that Doe stated a claim for damages was correct. That ruling is fully consistent with the language of Title IX and with this Court's intervening decision in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998). As we explain in our brief *amicus curiae* at the petition stage in *Davis*, the Court in *Gebser* addressed the circumstances under which an educational institution receiving federal funds may be held liable in damages in an implied right of action under Title IX when a teacher sexually harasses a student. The Court concluded that damages could be recovered in such a case only when "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs" and responds with deliberate indifference. *Id.* at 1999. The Court reasoned that, because Title IX's express remedial scheme permitting termination of federal funds is predicated on notice and an opportunity for the recipient to rectify a violation, Congress also did not intend to subject recipients of federal financial assistance to damages liability when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Ibid.*

The *Gebser* Court's ruling about the educational institution's potential liability did not depend upon the

harasser's status as an employee. In fact, the Court expressly rejected arguments that liability should be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. 118 S. Ct. at 1995, 1997. Rather, the Court emphasized that the educational institution's liability rests on its own "official decision * * * not to remedy the violation," not on the independent actions of its harassing employees. *Id.* at 1999.

It follows from that analysis that when school officials know that severe, persistent, or pervasive sexual harassment of a student is occurring under their education programs or activities, their failure to exercise their authority to address the harassment fosters a hostile educational environment and constitutes a violation of Title IX, whether the student's harasser is a school employee or another student. In either case the student is required to attend school in a discriminatorily hostile or abusive environment. When school officials knowingly fail to remedy a sexually hostile or abusive environment in an education program or activity, they "subject" harassed students to that environment in violation of Title IX. And *Gebser* makes clear that, when a school district responds with deliberate indifference to known incidents of sexual harassment of a student, it discriminates against that student in violation of Title IX, and the Spending Clause prerequisite for damages under Title IX is met. 118 S. Ct. at 1998-1999.

Doe's allegations meet the *Gebser* standard. She alleges that she was subjected to a campaign of harassment at the school by other students for three school semesters (Pet App. 153-154, 159-160, 162-164, 166); that teachers, the principal, the assistant director, and her counselor at University High School, as well as

numerous University officials, had actual knowledge of the harassment (*id.* at 153-158, 160-167); and that petitioner's officials responded with intentional indifference, taking little or no action in response to her and her parents' repeated complaints (*id.* at 149, 168); see also *id.* at 157 (also alleging deliberate indifference); *id.* at 170 (alleging reckless indifference). Because Doe alleged that "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it, *Gebser*, 118 S. Ct. at 1999, she has stated a claim for damages under Title IX.

2. The Court should deny review of the court of appeals' ruling that Congress's enactment of 42 U.S.C. 2000d-7 to abrogate the States' Eleventh Amendment immunity from suit under Title IX was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. The courts of appeals that have addressed this question since *Seminole Tribe* have agreed that the abrogation of Eleventh Amendment immunity in 42 U.S.C. 2000d-7,[4] which is applicable not only to Title IX but also to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 504 of the

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[4] Section 2000d-7 provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Rehabilitation Act of 1972, 29 U.S.C. 794, is a valid exercise of Congress's Section 5 powers.[5]

The court of appeals' ruling is correct. In *Seminole Tribe*, this Court articulated a two-part test to determine whether Congress has properly abrogated the States' Eleventh Amendment immunity (517 U.S. at 55) (citations, quotations, and brackets omitted):

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Petitioner does not dispute (see Pet. 21) that the first requirement is satisfied here. Nor could it. In 42 U.S.C. 2000d-7, Congress expressly stated its intent to abrogate the States' Eleventh Amendment immunity.[6] Petitioner also does not contend that the enactment of Section 2000d-7 is beyond the scope of Congress's powers under Section 5 of the Fourteenth Amendment

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[5] See *Lesage* v. *Texas*, No. 97-50454, 1998 WL 717230 (5th Cir. Oct. 13,1998) (Title VI); *Crawford* v. *Davis*, 109 F.3d 1281 (8th Cir. 1997) (Title IX); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998) (Title IX); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998) (Section 504). This is the same conclusion courts reached prior to *Seminole Tribe*. See *United States* v. *Yonkers Bd. of Educ.*, 893 F.2d 498, 503 (2d Cir. 1990); *Santiago* v. *New York State Dep't of Correctional Servs.*, 945 F.2d 25, 31 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992).

[6] See *Lane* v. *Pena*, 518 U.S. 187, 200 (1996) (Section 2000d-7 is "an unambiguous waiver of the States' Eleventh Amendment immunity"); *Gebser*, 118 S. Ct. at 1996; *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992); *id.* at 78 (Scalia, J., concurring).

(see Pet. 23-24).[7] Such a contention would be frivolous because prohibiting gender-based discrimination by state actors is clearly within Congress's powers under the Fourteenth Amendment.[8]

Relying upon *Gregory* v. *Ashcroft*, 501 U.S. 452, 469 (1991), and *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 16 (1981), petitioner contends (Pet. 21-24) that the abrogation in Title IX is invalid because Congress did not state expressly that it was exercising its powers under the Fourteenth Amendment. This Court rejected a similar argument in *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983):

> It is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," * * * for "[t]he constitutionality of action taken by Congress does not depend on

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[7] Petitioner conceded below that it did not "dispute that Congress *could have* enacted 42 U.S.C. § 2000d-7 under its Fourteenth Amendment powers." Combined Reply and Response Brief of Defendant-Appellant-Cross Appellee The Board of Trustees of the University of Illinois at 6.

[8] In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976), this Court held that Congress has the power to abrogate Eleventh Amendment immunity for sex discrimination claims pursuant to Section 5 of the Fourteenth Amendment. *Seminole Tribe* reaffirmed the holding of *Fitzpatrick*. See 517 U.S. at 59, 65-66, 71 n.15; cf. *United States* v. *Virginia*, 116 S. Ct. 2264, 2274-2276 (1996).

> recitals of power which it undertakes to exercise."

Id. at 243-244 n.18 (citing *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-478 (1980) (Burger, C.J.), and quoting *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)); see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 n.9 (1976) (relying on legislative history in determining whether "Congress exercised its power under § 5 of the Fourteenth Amendment").[9]

As the Court explained in *Wyoming*, 460 U.S. at 244 n.18, *Pennhurst* involved the construction, not the constitutional validity, of a federal statute. Similarly, in *Gregory*, this Court was confronted with ambiguous statutory language and was attempting to determine its meaning. It held that a "plain statement" would be required before it would interpret a federal statute to

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[9] The legislative history of Section 2000d-7 makes it clear that Congress intended to exercise its Fourteenth Amendment powers in enacting that provision. Senator Cranston, the provision's primary sponsor, described the proposed legislation as "clearly authorized" by both the Spending Clause and Section 5 of the Fourteenth Amendment. 131 Cong. Rec. 22,346 (1985). The Senate Committee Report likewise referred to both of those constitutional provisions as permitting abrogation of state immunity. See S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). After the Senate version of the bill was adopted in conference, Senator Cranston submitted for the record a letter from the Department of Justice stating that

> [t]he proposed amendment * * * fulfills the requirements that the Supreme Court laid out in Atascadero. Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, [it] makes Congress' intention "unmistakably clear in the language of the statute" to subject States to the jurisdiction of Federal courts.

132 Cong. Rec. 28,624 (1986) (citations omitted).

"upset the usual constitutional balance of federal and state powers." 501 U.S. at 460. In so holding, it noted that the *Pennhurst* rule was a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470; see *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); cf. *Pennsylvania Dep't of Corrections* v. *Yeskey*, 118 S. Ct. 1952, 1954 (1998).

There is no ambiguity about Congress's intent to abrogate the States' Eleventh Amendment immunity in Title IX actions. Section 2000d-7 contains an unambiguous statement of such congressional intent. "Here, there is no doubt what the intent of Congress was: to extend the application of the [Act] to the States. The observations in *Pennhurst* therefore simply have no relevance to the question of whether, in this case, Congress acted pursuant to its powers under § 5." *Wyoming*, 460 U.S. at 244 n.18.[10]

Petitioner also contends (Pet. 24-28) that the cause of action recognized by the court of appeals exceeds Congress's authority under the Fourteenth Amendment and therefore is inconsistent with its finding of a valid abrogation of Eleventh Amendment immunity. Relying

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[10] The abrogation of Eleventh Amendment immunity may also be upheld on the ground that petitioner waived its immunity when it accepted federal funds. See *Clark* v. *California*, 123 F.3d at 1271 ("One way for a state to waive its immunity is to accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.' * * * In this case, the Rehabilitation Act manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247 (1985))). As noted above, see note 2, *supra*, the court of appeals did not reach this argument because of its rejection of petitioner's argument on other grounds.

on *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), petitioner argues that Congress lacks the authority to enact legislation that exceeds the substantive guarantees of the Fourteenth Amendment. Thus, it argues, because a violation of the Equal Protection Clause requires proof of discriminatory intent, no abrogation of Eleventh Amendment immunity is valid for a cause of action under Title IX that does not require such a showing of intent.

Petitioner's argument is of no relevance to this case because the court of appeals held that Doe's allegations, which must be taken as true at this juncture of the case, *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), constitute allegations that petitioner or its officials intentionally discriminated against Doe on the basis of sex. Pet. App. 18. The court held that Doe's allegation that petitioner or its officials failed "promptly to take appropriate steps in response to known sexual harassment is itself intentional discrimination on the basis of sex," *ibid.*, thereby satisfying any requirement that intentional discrimination be alleged.[11]

Moreover, this case would present a poor vehicle for the Court's review of petitioner's *City of Boerne* claim because the court of appeals did not address the matter

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[11] The court of appeals explained that Doe's allegation of intentional sexual discrimination "assumes that the combination of knowledge that sexual harassment is occurring in activities under the school's control and intentional failure to take prompt, appropriate action (such as investigation and, if warranted, disciplinary measures) is presumably, perhaps even necessarily, a manifestation of intentional sex discrimination. * * * After all, what other good reason could there possibly be for refusing even to make meaningful investigation of such complaints, as Jane Doe alleges University High officials did in this case?" Pet. App. 23 (citations omitted).

due to the fact that petitioner raised it for the first time in its petition for rehearing with suggestion for rehearing en banc. See *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984) (declining to consider argument made for the first time in response to a petition for rehearing); *Yeskey*, 118 S. Ct. at 1956 (declining to consider argument not raised before or addressed by court of appeals).

In any event, the premise of petitioner's contention is wrong. Section 5 authorizes Congress to enact legislation that "deters or remedies constitutional violations * * * even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne*, 117 S. Ct. at 2163 (quoting *Fitzpatrick* v. *Bitzer*, 427 U.S. at 455). While *City of Boerne* made it clear that Congress does not have the authority to "decree the substance of the Fourteenth Amendment's restrictions on the States," 117 S. Ct. at 2164, it reaffirmed earlier holdings that Congress may enact legislation intended to prevent or remedy constitutional violations, as long as there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Ibid.*

The cause of action for damages recognized by the court of appeals here—and by this Court in *Gebser*—is well within Congress's authority to remedy and prevent constitutional violations. As this Court recognized in *Gebser*, "harassment unfortunately is an all too common aspect of the educational experience." 118 S. Ct. at 2000. And the standard of liability adopted in that case—which requires recipients of federal financial assistance to respond with something more than deliberate indifference when they have actual knowledge of sexual harassment in their educational programs—was

intended to implement the basic Title IX goal of "prevent[ing] recipients of federal financial assistance from using the funds in a discriminatory manner." *Ibid.* Such a cause of action is a permissible legislative means of remedying and preventing unconstitutional sex discrimination by public actors.

CONCLUSION

With regard to petitioner's contention that Doe failed to state a claim under Title IX, the petition for a writ of certiorari should be held pending this Court's decision in *Davis* v. *Monroe County Board of Education*, No. 97-843, and disposed of in accordance with the decision in that case or, alternatively, denied. In all other respects, the petition should be denied.

Respectfully submitted.

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(3)

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In The

Supreme Court of the United States

October Term, 1998

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS,

Petitioner,

vs.

JANE DOE,

Respondent,

and

THE UNITED STATES,

Intervenor-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner The Board of Trustees of the University of Illinois (the "University") submits this Reply to the Brief for the United States and the Brief for Respondent Jane Doe ("Doe") in response to the University's Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review four (4) questions presented by the Seventh Circuit decision herein, reported at *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998), *petition for cert. filed*, 67 USLW 3083 (July 13, 1998) (No. 98-126).

DISCUSSION

The University seeks review of four (4) questions presented:

(1) Whether a cause of action under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX") can be maintained against educational institutions receiving federal funds for student peer sex harassment without pleading and proving an intent to discriminate on the basis of sex by the institution;

(2) If so, whether the applicable standard of liability is deliberate indifference, pursuant to *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S.Ct. 1989 (1998);

(3) Whether Congress abrogated the States' Eleventh Amendment immunity from suit under Title IX pursuant to a valid (*albeit* unstated) exercise of power under Section 5 of the Fourteenth Amendment, as required by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and

(4) Whether the recognition of a cause of action which does not require proof of sexually discriminatory intent by a State institution exceeds the substantive guarantees of the Fourteenth Amendment pursuant to *City of Boerne v. Flores*, 521 U.S. 507 (1997) and, therefore, could not be a valid abrogation of the Eleventh Amendment sovereign immunity of the States from such a suit.

Subsequent to the filing of the petition herein, the Supreme Court granted certiorari in *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*), *cert. granted*, 66 USLW 3387 (September 29, 1998) (No. 97-843), to review whether Title IX, which prohibits sex discrimination in federally funded education programs and activities, encompasses a cause of action for student peer hostile environment sexual harassment.

In response to the University's petition herein, the United States maintains that the petition should be held pending the Court's decision in *Davis* and disposed of in accordance with that decision, or alternatively denied. In all other respects, the United States submits that the petition should be denied. Doe responded to this petition prior to the Supreme Court's grant of certiorari in *Davis*, and maintains that the petition should be denied.

The University states in reply that the petition should be granted, in whole or in part, and consolidated for review with *Davis* or, alternatively, that the petition should be held pending the Court's decision in *Davis* and disposed of in accordance with that decision. The University submits that the petition should *not* be denied in any respect at this time.

The first question presented by the University regarding whether a cause of action exists under Title IX against educational institutions receiving federal funds for student peer sex harassment will be addressed by the Court in *Davis*, unless that case is settled by the parties thereto. Indeed, contrary to Doe's brief, the Seventh Circuit's recognition of a cause of action for student peer sex harassment herein created a conflict with the decision of the Eleventh Circuit in *Davis*, as well as with the Fifth Circuit in *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir.), *cert. denied*, 117 S.Ct. 165 (1996). Because of the similar issues presented and the opposite conclusions reached by the Seventh and Eleventh Circuits on the question presented in *Davis*, the University maintains that the Court should grant the University's petition and consolidate *Doe* with *Davis* at least as to the first question presented, or hold the petition pending the Court's decision in *Davis* and dispose of this petition in accordance with that decision. *See Lehman Bros. v. Schein*, 416 U.S. 386, 387 (1974) (petitions for certiorari in three cases which raised the identical question were granted and consolidated for oral argument).

The Court should *not* deny the petition at this time. The Court in *Davis* will decide whether a cause of action exists for student peer sex harassment against institutions under Title IX. *Davis* held that such a cause of action does not exist; *Doe* held that such a cause of action does exist. A denial of the petition herein and remand for further proceedings at this time would not be in the interest of justice. In the event the Court affirms the Eleventh Circuit's opinion in *Davis*, the Court would necessarily reverse the Seventh Circuit's decision herein in *Doe* and

no further proceedings in this case would be necessary. Therefore, the University respectfully requests the Court not to deny the petition at this time and, at a minimum, to hold it pending the Court's decision in *Davis*.

Contrary to the United States' brief, the fact that the initial question presented herein is raised at the pleading stage does not diminish the appropriateness of the Court's review of the question. Indeed, the *Davis* case is also a case decided on a motion to dismiss. It would not be an efficient use of the judicial system or the resources of the parties to have the *Doe* matter proceed while this Court is determining in *Davis* the fundamental question of whether there is such a cause of action.

The University also submits that the Court should either grant the University's petition on the three other issues presented, or hold the petition pending the Court's decision in *Davis* and dispose of these issues once a decision in *Davis* has been made. In the event the Court determines in *Davis* that there is no cause of action under Title IX against educational institutions for student peer sex harassment, the remaining issues presented in this petition will be moot. However, in the event the Court recognizes a cause of action for student peer sex harassment in *Davis* against the Monroe County Board of Education, the Court should consider the remaining issues presented in the University's petition herein: the appropriate standard (*i.e.*, deliberate indifference), and the availability of such a cause of action against State entities such as the University in light of the Eleventh Amendment sovereign immunity issues presented.

Contrary to the United States' and Doe's briefs, the Seventh Circuit decision in *Doe* is *not* consistent with the Court's recent decision in *Gebser*, wherein the Court held that the proper standard of liability applicable to institutional liability for teacher/student sex harassment claims under Title IX was deliberate indifference. To the contrary, the Seventh Circuit recognized a hybrid standard of liability, requiring actual knowledge by responsible officials and "failure to take prompt, appropriate" responsive action. *Doe*, 138 F.3d at 661 (A. at 18). The University respectfully submits that the Court would not apply a lesser standard of Title IX liability to institutional responses to student peer sex harassment then applied to teacher/student sex harassment. Therefore, at a minimum, if a cause of action for student peer sex harassment is recognized by the Court in *Davis*, the Court should remand this case to the Seventh Circuit for further proceedings consistent with *Davis* and *Gebser*.

Contrary to the United States' and Doe's briefs, this case is *not* a poor vehicle for the Court's review of the University's *City of Boerne* argument that the recognition of a cause of action against State educational institutions for failing to take prompt and appropriate action in response to student peer sex harassment without a showing of an intent to discriminate on the basis of sex by the institution would exceed the substantive protections of the Fourteenth Amendment and, accordingly, could not be a proper abrogation of the States' Eleventh Amendment immunity from such suits. The Court will address whether there is a cause of action against educational institutions for student peer sex harassment in *Davis*.

However, *Davis* does not involve a State educational institution and does not present the Eleventh Amendment issues which are implicated by the recognition of such a cause of action against State educational institutions. Due to the numerous State institutions of education, a complete review of the availability of a Title IX cause of action for student peer sex harassment necessarily involves a determination of the Eleventh Amendment issues presented herein. The Eleventh Amendment issues are legal issues, which are not factually based. Therefore, notwithstanding that the *City of Boerne* issues were presented for the first time in the petition for rehearing with suggestion for rehearing *en banc*, the Court can fully review the Eleventh Amendment questions of law presented. *See Parratt v. Taylor*, 451 U.S. 527, 556 n.2 (1981) (dissent) (issue addressed by Court was first presented in petition for rehearing); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 579 (1980) (issue addressed by Court was raised for first time in a footnote in petition for rehearing).

CONCLUSION

The University requests the Court to grant the University's petition, in whole or in part, and consolidate the issues presented with *Davis*. At a minimum, the Court should hold the University's petition pending the Court's decision in *Davis*, and dispose of the petition in accordance with the Court's decision in *Davis*, as well as in

Gebser, if necessary. The Court should *not* deny the petition at this time.

Respectfully submitted,

The Board of Trustees of the University of Illinois

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